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(16,459.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1896.

No. 680.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B.
BAILEY, AND JOHN LEETCH, PLAINTIFFS IN ERROR,

vs.

THOMAS G. LANSDEN.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY, and JOHN LEETCH, Appellants,
vs.
 THOMAS G. LANSDEN. } No. 583.

Supreme Court of the District of Columbia.

THOMAS G. LANSDEN, Plaintiff,
vs.
 THE WASHINGTON GAS LIGHT COMPANY (a Corporation); John R. McLean, President; Charles B. Bailey, Secretary; William B. Orme, Assistant Secretary, and John Lee-ch, General Superintendent, Defendants. } At Law. No. 36410.

UNITED STATES OF AMERICA, } ss:
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed June 9, 1894.

In the Supreme Court of the District of Columbia.

THOMAS G. LANSDEN, Plaintiff,
vs.
 THE WASHINGTON GAS LIGHT COMPANY (a Corporation); John R. McLean, President; Charles B. Bailey, Secretary; William B. Orme, Assistant Secretary, and John Leetch, General Superintendent, Defendants. } At Law. No. 36410.

The plaintiff, Thomas G. Lansden, complains of the defendants, The Washington Gas Light Company, a corporation duly incorporated and doing business in the city of Washington, in the District of Columbia; John R. McLean, who is president of the said company; Charles B. Bailey, who is secretary; William B. Orme, who is assistant secretary, and John Leetch, who is general superintendent of the same, of a plea of trespass on the case:

2 For that whereas the plaintiff is and ever has been a person of truth and honesty, faithful in business, and upright in his conduct, and is and ever has been wholly free from the vice of prevarication or of falsification, and, until the committing of the griev-

ance hereinafter mentioned, was always reputed, and deservedly, to be a person of good fame and credit, and, until the committing of the said grievance, never had been suspected to be guilty of improper, unfair, dishonest, or untruthful speech or conduct of any kind or in any way;

And whereas also before the committing of the said grievance, to wit, in January, 1893, the House of Representatives having in its action on the sundry civil appropriation bill for the fiscal year ending June 30, 1894, provided that not more than seventy-five cents per thousand feet should be paid for the gas used in the Government buildings in the District of Columbia, the defendant John R. McLean, then and now the president of the said company, told the plaintiff, then in the employ of the said company, that he, the said McLean, wanted the plaintiff to furnish him, the said McLean, with a written memorandum showing to what he, the plaintiff, could testify in regard to the matter before a committee of Congress, the memorandum to serve as a basis for questioning by a member of the committee, as represented by the said McLean; and the plaintiff wrote out such a memorandum, but did not mention therein the cost of gas to the defendant company, and gave the said memorandum to the said McLean, who, noticing that the plaintiff had said nothing as to the cost of gas, told the plaintiff that the committee would be apt to ask questions in regard to the cost; but the plaintiff, being concerned with the making only of gas and not with its distribution, told the said McLean that he, the said McLean, would himself have to answer such questions, the actual cost, embracing all parts of the service, being known to only the chief officers of the company, and the plaintiff was not called or used by the said McLean or by the defendant company, of which the said McLean was president, as a witness before a committee of Congress on the occasion aforesaid, nor did he, the plaintiff, appear or testify to or before a committee of Congress as to the cost of gas or as to any other matter pertaining to the defendant company or its business on the occasion aforesaid or in the year aforesaid.

But the plaintiff did thereafter, on another occasion, to wit, in February, 1894, and when not thereto required or requested by the said McLean, the defendant company, or any of its officers or agents, appear before a committee of Congress and testify to the figures at which he, the plaintiff, supposed that gas could be actually produced and furnished in the city of Washington.

Yet the defendants, well knowing the premises, but fraudulently, maliciously, and wickedly contriving to injure the plaintiff in his said good fame and credit, and to bring him into scorn, public scandal, infamy, and disgrace, and to injure him in the business which he had theretofore followed, to wit, that of working in the manufacture of gas, and to vex, harass, oppress, impoverish,

3 and wholly ruin him, the said plaintiff, did heretofore, to wit, in the month of February, 1894, compose and publish and cause and procure to be composed and published of and concerning the plaintiff and of and concerning the testimony by him given before the committee of Congress as aforesaid, in a certain newspaper

or periodical called "The Progressive Age," the same being printed in the city of New York, State of New York, and widely circulated as an organ devoted to the interests of gas producers and manufacturers throughout the country, a certain false, scandalous, malicious, and defamatory libel of the tenor following, to wit:

"The acrobatic performances of Lansden" (meaning the plaintiff).

"To a very recent date, assuming his St. Louis exploit to have been overlooked and pardoned, Mr. Thomas G. Lansden, late superintendent of the Washington, D. C., Gas Light Company, while doing nothing in particular to direct attention to his connection with the gas industry as a whole, has refrained from conduct that would lower him in the eyes and opinions of his coworkers or forfeit him the respect due a man of Mr. Lansden's years and former position in the business.

"A congressional committee has been investigating the Washington Gas Light Company. Complaints were lodged by some of the patrons of the company with the Committee on the District of Columbia, which has jurisdiction in all matters affecting affairs connected with the capital city, and Congress ordered an investigation. Many witnesses have been heard on both sides of the question, and among them appeared Mr. Thomas G. Lansden, who had filled the position of superintendent with this company for a period of seven years prior to his resignation in June of last year. This gentleman did not come forward, as might have been expected, to render such help as he could to assist his former associates over their present difficulties and to say a good word in behalf of the company with which he had so long been identified and by which he had been most generously requited; on the contrary, Mr. Lansden has arrayed himself within the ranks of those who sought to tear down and lay waste the business and emoluments of his former employers. Moreover, by reason of the nature of his testimony, Mr. Lansden has caused a report of his statements to be circulated the length and breadth of the land, and the subject-matter contained therein is well calculated to do the utmost harm to gas interests everywhere. Mr. Lansden's statements as made under oath before this investigating committee have been telegraphed from one end of the country to the other, and newspapers in many of the principal cities throughout the United States have copied the statements which have appeared in all Washington papers during the progress of the investigation. To what extent is best shown when we say that more than a score of newspapers containing Mr. Lansden's statements about the cost of making and distributing gas have come to our notice since his testimony was given, and the end is not yet. The figures of cost supplied by Mr. Lansden are startling, to say the least, and more than one gas company will, we apprehend, ere long find itself confronted with his figures and compelled to battle hard in an effort to overcome the bad effects on the public mind.

"It is because of the general interest that is likely to suffer for

Mr. Lansden's indiscretion that we give heed to the matter, not through a desire to extend special favor to the Washington Company, nor is it because of any ill will entertained by us for Mr. Lansden. If the cause of the company is just, as we believe it to be, it will come out of the investigation a victor. The present investigation is not the first in which Mr. Lansden has appeared as witness. Only a year ago a similar inquiry emanating from the same quarter was instituted against the Washington Gas Light Company. Then Mr. Lansden appeared as a witness in behalf of the company. He at that time occupied the position of superintendent with the company. His testimony then and that of this year are so sadly at variance that we should be remiss in our duty if we permit the occasion to pass without directing attention to these differences. Moreover, we should be guilty of withholding from gas managers information which will be of material assistance to them in breaking the force and effect of Mr. Lansden's recent statements.

"Under a former resolution of Congress bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas at Washington. We herewith give the questions propounded to Mr. Lansden during the investigation of last year and his replies thereto. This we follow with the interrogatories put to him and his answers during the present investigation:

Lansden in 1893.

"Question. What does gas cost to manufacture at your works?

Answer. It costs 48.38 cents per thousand in the holder and 40.09 cents per thousand for distribution.

Q. Can you in any way reduce the cost of gas in manufacturing so your company could sell for less to the consumer?

A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

Q. How do the prices charged for lamps in Washington compare with other cities?

A. They are as low as any where the same amount of gas is burned to the lamp and the same number of hours lighted in the year and when the company lights and cleans the lamps.

Lansden in 1894.

Q. From your knowledge of the business and condition of affairs here, at what price could the gas company sell gas and pay a reasonable profit?

A. Well, sir, I think they can sell it at \$1 a thousand.
5 That is the reason I came before this committee. I am a gas-consumer today, and I have had a good deal of experience, and I think it to the interest of the gas company to stop all these troubles, and they should put the price down to \$1 a thou-

sand and stop the annoyance. They should make good gas and put the price down to \$1.

Q. Will it stop the complaints?

A. Not entirely. You never will do that.

Q. What is the result of your experience, if you are able to submit a statement to the committee—leaving out of consideration the interest on investment and plant, etc., what is the actual cost per thousand for the production of gas in the city of Washington?

A. Do you mean what it can be made for?

Q. What did you make it for under your management?

A. Without counting interest, you mean?

Q. Without counting the interest on investment.

A. It can be put in the holder with the present modern machinery which the company has for about 32 cents, with the proportion they are making now of water gas and coal gas. I think it ought to be distributed for 20 to 22 cents a thousand.

Q. What is the next item of cost after putting it in the holder?

A. Distribution. After it is put in the holder it is drawn out by the consumer; and then there is the expense of inspectors taking the statements and running what we call the upper offices.

Q. What percentage of cost would that be?

A. I put that between 20 and 22 cents.

Q. That would make this cost 54 to 56 cents per thousand?

A. Yes, sir; I think so.

Q. That includes office expenses?

A. Then come taxes and repairs, and I think it can be easily made inside of 70 cents, counting in repairs and taxes.

Q. Now, does that include everything except interest on investment?

A. Interest on investment comes in the shape of dividends, I consider.

“From the foregoing extracts of this witness’ testimony only one of two conclusions can be arrived at, and we are too sensible of the reader’s power of analysis and feel too keenly for the witness to heap coals of fire on the head of one whom, it is only too evident, has allowed his sense of justice to be distorted by real or fancied grievances. The testimony given by Mr. Lansden in 1893 states in effect that there is no way open to his company by which it could reduce the cost of manufacturing gas. In 1894 he tells the committee that, taxes and repairs added—items not considered in the inquiry of the previous year—the cost of gas delivered to the consumer could be brought within 70 cents, or about 18½ cents less per thousand than he quoted as the lowest manufacturing and distributing cost the year before; and yet Mr. Lansden must know that the generating apparatus at the Washington works is the same as when he filled the position as superintendent; that the cost of all materials used, coal, and labor are just the same, save only naphtha, which is now higher in price than when he testified a year ago.

“Every man must be the custodian of his own conscience, and

it is not for us to decide how Mr. Lansden will reconcile himself to his present unhappy position. If the gentleman has given up all thought of again associating himself with a gas enterprise, possibly he is indifferent to the effect of his predicament, but if he still entertains an idea of continuing his former calling he should lose no time in setting himself straight in the eyes of his former associates. In view of the testimony, we can readily believe this will prove a most difficult undertaking, but there is always two sides to a story, and possibly Mr. Lansden may have in reserve some evidence that will enable him to sustain his present position; if so, our columns are open to him for such purpose."

Which said false, scandalous, malicious, and defamatory libel was composed and published and procured to be composed and published by the defendants of an- concerning the plaintiff, the defendants meaning and intending thereby to charge the plaintiff with having on a previous occasion, before a committee of Congress, testified as to the cost of furnishing gas in a manner altogether different from the manner in which he testified in February, 1894, and in a manner wholly inconsistent therewith, whereas in truth and in fact the plaintiff did not testify before a committee of Congress except in 1894, as aforesaid, and did not on any previous occasion speak to such a committee of or concerning the cost of gas, and further meaning and intending thereby to make it appear that the plaintiff, by appearing and testifying as he did before the committee of Congress in 1894, had grossly violated his duty to the defendant company and perpetrated a wrong upon it and all other gas companies in the country, whereas in truth and in fact the plaintiff did not violate his duty nor do an injustice to the defendant company or any one else in or by his testimony so given as aforesaid, and further meaning and intending thereby to charge the plaintiff with having committed perjury before a committee of Congress authorized and empowered by law to administer oaths to witnesses in any matter under congressional investigation, and a witness who has taken such oath and given testimony thereunder falsely is by law guilty of perjury and liable to be punished with the pains and penalties for said offense provided.

By means of which false and scandalous libel the plaintiff has suffered great anxiety of mind and hath been and is greatly injured in his good name and reputation, and brought into scorn, public scandal, infamy, and disgrace, insomuch that divers good and worthy citizens have, by reason of the committing of the grievance aforesaid, suspected and believed and still do suspect and believe the plaintiff to have testified on two occasions, as in the said publication mentioned and in the inconsistent manner therein alleged, and to have been guilty of bad and improper conduct so published of and concerning him, and have, by reason of the committing of the said grievances, thence till now wholly refused to have any transaction, acquaintance, or business dealing with the plaintiff, as they otherwise would have had, to the

damage of him, the said plaintiff, in the sum of fifty thousand dollars (\$50,000.00), and therefore he brings his suit.

J. ALTHEUS JOHNSON,
J. J. DARLINGTON,
Attorneys for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

J. ALTHEUS JOHNSON,
J. J. DARLINGTON,
Attorneys for Plaintiff.

Defendants' Plea.

Filed June 29, 1894.

In the Supreme Court of the District of Columbia.

THOMAS G. LANSDEN, Plaintiff,	}	At Law. No. 36410.
<i>vs.</i>		
THE WASHINGTON GAS LIGHT COMPANY (a		
Corporation); John R. McLean, President;		
Charles B. Bailey, Secretary; William B.		
Orme, Assistant Secretary, & John Leetch,		
General Superintendent, Defendants.		

Now come the defendants and for plea to the declaration filed in the above-entitled suit say that they are not guilty as therein alleged.

A. T. BRITTON,
A. B. BROWNE,
WEBB & WEBB,
Attorneys for Defendants.

Joinder in Issue.

Filed June 30, 1894.

In the Supreme Court of the District of Columbia.

THOMAS G. LANSDEN, Plaintiff,	}	At Law. No. 36410.
<i>vs.</i>		
THE WASHINGTON GAS LIGHT COMPANY <i>et al.</i>		

The plaintiff joins issue upon the defendants' plea.

J. J. DARLINGTON,
J. ALTHEUS JOHNSON,
Attorneys for Plaintiff.

Memorandum.

March 6, 1896.—Verdict for plaintiff *vs.* defendants The Washington Gas Light Co., Charles B. Bailey, and John Leetch for \$12,500.00.

March 10, '96.—Motion for new trial filed.

SATURDAY, April 4, 1896.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

The following cases were certified to crim. court No. 1, Justice Cole presiding.

THOMAS G. LANSDEN, Plaintiff,

vs.

THE WASHINGTON GAS LIGHT COMPANY (a Corporation), John R. McLean, Charles B. Bailey, William B. Orme, John Leetch, Defendants.

At Law. No. 36410.

This case coming on for hearing upon the defendants' motion for a new trial and the same having been heard, it is considered by the court that said motion be, and the same is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against the defendants The Washington Gas Light Company, Charles B. Bailey, and John Leetch, twelve thousand five hundred dollars (\$12,500), in manner and form aforesaid assessed, with interest thereon from the 6th day of March, 1896, being the money payable by them to the plaintiff by reason of the premises, together with his costs of suit, to be taxed by the clerk, and have execution thereof.

Whereupon the defendants note an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond fixed at \$20,000.00, to act as a supersedeas.

Memorandum.

April 6, '96.—Jan'y term extended 30 days to settle bill of exceptions.

Order for Appeal.

Filed April 24, 1896.

In the Supreme Court of the District of Columbia, the 24 Day of April, 1896.

THOS. G. LANSDEN

vs.

THE WASHINGTON GAS LIGHT COMPANY *et al.*

At Law. No. 36410.

The clerk of said court will please enter an appeal from the judg-

ment in this case rendered on April 4th and issue citation to the appellee.

W. D. DAVIDGE,
WEBB, WEBB & LINDSLEY,
*Attorneys for the Washington Gas Light Company, John
Leetch, Chas. B. Bailey, Appellants.*

In the Supreme Court of the District of Columbia.

THOMAS G. LANSDEN

vs.

THE WASHINGTON GAS LIGHT COMPANY, } At Law. No. 36410.
John R. McLean, Charles B. Bailey, Wil-
liam B. Orme, and John Leetch.

The President of the United States to Thomas G. Lansden, Greeting :

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 24th day of April, 1896, wherein The Washington Gas Light Company, Charles B. Bailey, and John Leetch are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bing-
Seal Supreme Court ham, chief justice of the supreme court of the
of the District of District of Columbia, this 24th day of April,
Columbia. in the year of our Lord one thousand eight
hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 25 day of April, 1896.

J. J. DARLINGTON,
Attorney for Appellee.

Memorandum.

April 24, '96.—Bond for appeal filed.

10 WEDNESDAY, May 6, 1896.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

* * * * *

THOMAS G. LANSDEN, Plaintiff,

vs.

THE WASHINGTON GAS LIGHT CO. *et al.*, Defendants. } At Law.
No. 36410.

Now again come here the defendants, by their attorneys, and tenders to the court here their bill of exceptions taken during the

trial of this case, and prays that it may be duly signed, sealed, and made a part of the record, now for then, which is done accordingly.

Bill of Exceptions.

Filed in open court May 6, 1896.

In the Supreme Court of the District of Columbia.

THOMAS G. LANSDEN

vs.

THE WASHINGTON GASLIGHT COMPANY, JOHN R. Mc-
Lead, Charles B. Bailey, William Orme, and John
Leetch.

At Law.
No. 36410.

Be it remembered that the above-entitled cause came on — trial on the second day of March, A. D. 1896, before Mr. Justice Cole and a jury, when were present on behalf of the plaintiff Mr. Darlington and Mr. Johnson and on behalf of the defendant- Messrs. Webb and Webb and A. B. Browne.

And thereupon the plaintiff, to maintain the issues on his part joined, produced as a witness one JOHN LEETCH, who, being first duly sworn, testified that he had been served with a subpoena to produce a letter of E. C. Brown, the editor of *The Progressive Age*, dated the 12th of February, 1894, and that he had that letter in his possession.

And thereupon counsel for the plaintiff read in evidence to the jury the said letter, which was in the words and figures following, to wit:

" E. C. Brown, publisher.

Established 1883.

Office of *Progressive Age*. Gas, electricity, water.

NEW YORK, *February 12, 1894.*

Washington Gas Light Co., Washington, D. C.

GENTLEMEN: I have watched with great interest the continued reports of the proceedings against your company as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony.

11 Was his statements correctly reported in the *Washington Star* of 3rd inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

Very truly yours,

E. C. BROWN."

And thereupon the plaintiff, further to maintain the issues on his part joined, produced and read in evidence the deposition of a witness, E. C. Brown, wherein the said witness testified that he is a

resident of the city of New York, is 27 years of age, and that he is an editor and publisher by occupation; that in February and March of 1894 he was the editor of a newspaper called The Progressive Age and was the president of the company publishing the same, which was called The Progressive Age Publishing Company; that he was the editor of the paper marked "T. G. L. No. 1," bearing date March 1st, 1894, and the president of the company which published the same; that the said publication is devoted specially to gas, and that it circulates generally throughout the United States; that the Washington Gaslight Company is a subscriber to said publication, "The Progressive Age," but that, to the best of his knowledge, none of the officers of said company are subscribers, and that but one single copy of said publication was sent to the Washington Gaslight Company prior to April 12, 1894; that after the institution of a suit against The Progressive Age Publishing Company by Lansden for an alleged libel he, witness, sent five copies to the Washington Gaslight Company and none, so far as he knows, to other places; that none were sent on the order or request of the defendants herein named or any of them or of any agent or employé of the Washington Gas Light Company.

And thereupon, on cross-examination, the said witness testified that he regularly received newspapers from all over the country; that prior to the publication of the article in controversy concerning the testimony of the plaintiff as to the cost of making gas, articles had been called to his attention in the Washington Star during the continuance of the congressional investigation on the subject of the price of gas in Washington in February, 1894, in the Washington Post during the same time, the St. Louis Globe-Democrat, the Cincinnati Tribune, the Washington, Indiana, Gazette, the Buffalo (New York) Express, all during the same time, February, 1894, and others, which he does not now remember; that he had prepared a copy of his correspondence with the plaintiff Lansden subsequent to the first day of March, A. D. 1894, in regard to the article entitled "The acrobatic performances of Lansden," which he produced and was willing to deliver; that the plaintiff Lansden, on account of said article, had instituted suit against The Progressive Age Publishing Company for the sum of \$50,000; that the suit was instituted April 12, 1894, and that the parties thereto were Thomas

12 G. Lansden, plaintiff, and The Progressive Age Publishing Company, defendant; that the suit is for \$50,000 damages for alleged libel in publishing the article entitled "The acrobatic performances of Lansden."

The said witness during his examination refused to answer the fourth, fifth, sixth, seven-, and eighth direct interrogatories and the second cross-interrogatory. The said questions having been referred to the court and the witness being ordered to answer said interrogatories, he stated in answer to the fourth interrogatory, which is in the words and figures following, to wit:

"Fourth interrogatory. If the fact be, and if your answers to the previous questions so show, that you are the manager, editor, president, or proprietor of the publication a copy of which is thus ex-

hibited, look at the article entitled 'The acrobatic performances of Lansden,' which appears in the issue thus exhibited, and state whether the defendants, John R. McLean, Charles B. Bailey, William B. Orme, and John Leetch, or either or any of them, or any agent or employee of them or either of them, or any agent or employee of the Washington Gas Light Company, wrote, contributed, or furnished any letter, document, or written memorandum of any character which entered into or served as the basis of the said article, and if such document, writing, or memorandum be within your reach or subject to your control, produce the same in connection with this examination and file with this your deposition, and if such were once but are not now in your custody or control, state when, to whom, and under what circumstances you parted with the custody and control,"

Said witness answered as follows:

"After Mr. Lansden's testimony in the 1894 congressional investigation had been noted by me in various newspapers I wrote the Washington Gas Light Co., asking them to confirm certain statements that had appeared, and I received in reply to my letter the accompanying communication, which I now produce and file."

The original is produced is compared by counsel with the copy, and the copy found to be correct. Counsel for the witness declines to part with the custody of the original; which copy is in the words and figures following, to wit:

"WASHINGTON, D. C., Feb. 13, 1894.

E. C. Brown, Esq., publisher Progressive Age, 280 Broadway, N. Y.

DEAR SIR: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former sup't of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for seventy cents, and to the consumer for \$1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington and made the following replies:

"Q. What does gas cost to manufacture at your works?

A. It costs us 48.38c. per thousand in the holder and 40.09c. per thousand for distribution.

Q. Can you in any way reduce the cost of gas in the manufacturing, so your company could sell for less to the consumer?

A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

Q. How do the prices charged for lamps in Washington compare with other cities?

A. They are as low as any where the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps.'

You will notice that he makes a difference of about 18½ cents per 1,000 feet then as compared with his statement now, although he must know that the material used, coal, and labor is just the same now as then, except price of naptha, which is higher. You can try to reconcile the two statements.

Very truly yours,

JOHN LEETCH,
General Manager."

To the fifth interrogatory, which is as follows:

"Fifth interrogatory. State whether writings or memoranda of any description affording facts, suggestions, material, or assistance of any kind in or for the preparation of the article in question were furnished to you or the 'Progressive Age' by either or any of the parties above named, or by any agent or employee of them or either of them, or by any agent or employee of the Washington Gas Light Company; and, if so, produce the same and state by whom they were furnished and file with your deposition,"

He says:

"None whatever, other than that named in my answer to the fourth direct interrogatory. I received a copy of the report of the congressional investigating committee. By whom it was sent I do not know. I presume it came from one of the defendants."

To the sixth interrogatory, which is in the words and figures following, to wit:

"State whether any paper or written memorandum purporting to be the writing of Mr. Lansden, or represented so to be, was either filed with or exhibited to you or any officer or agent of the 'Progressive Age' as evidence of testimony that had been given by him in 1893; and, if so, state who filed or exhibited the same and where the same now is. Produce and file the same with your deposition if subject to your control,"

He says:

"I have no knowledge of such paper prior to the beginning of the suit against the Progressive Age Publishing Company for alleged libel. No such paper is in my control."

14 Counsel for the plaintiff presses for further answer, and the witness answers:

"No."

To the seventh interrogatory, which is in the words and figures following, to wit:

"State whether any writing or memorandum prepared by Mr. Lansden on the subject of the price at which gas could be produced in Washington or any writing or memorandum on that subject represented to have been so prepared was furnished or exhibited to you or the 'Progressive Age' by either or any of the defendants above named, or by any agent or employee of them, or by any agent

or employee of the Washington Gas Light Company; and, if so, state by whom the same was furnished or exhibited and where the same now is, and produce and file with your deposition if in your custody or subject to your control,"

He answers:

"Only as I have testified to in answer to the fourth interrogatory."

To the eighth interrogatory, which is:

"State what information, if any, was furnished orally by the defendants above named, their agents or employees or any of them, for the preparation of the said article, or by any agent or employee of the Washington Gas Light Company. Rehearse fully the connection, if any, which subsisted between the parties here described, or any of them, and the said article,"

He answers:

"No oral communication whatsoever."

To the second cross-interrogatory, which is as follows:

"State whether defendants or any of them requested or solicited publication in the 'Progressive Age' at any time of any information or statement relating to the plaintiff in any manner,"

He answers:

"They never did."

And thereupon, further to maintain the issues on his part joined, counsel for the plaintiff read in evidence to the jury the following article from the *Progressive Age*, under date of March 1st, 1894; which article is in the words and figures following, to wit:

"The Acrobatic Performances of Lansden.

To a very recent date, assuming his St. Louis exploit to have been overlooked and pardoned, Mr. Thomas G. Lansden, late superintendent of the Washington, D. C., Gas Light Company, while doing nothing in particular to direct attention to his connection with the gas industry as a whole, has refrained from conduct that would lower him in the eyes and opinions of his coworkers or forfeit him the respect due a man of Mr. Lansden's years and former position in the business.

A congressional committee has been investigating the Washington Gas Light Company. Complaints were lodged by some
15 of the patrons of the company with the Committee on the District of Columbia, which has jurisdiction in all matters affecting affairs connected with the capital city, and Congress ordered an investigation. Many witnesses have been heard on both sides of the question, and among them appeared Mr. Thomas G. Lansden, who had filled the position of superintendent with the company for a period of seven years prior to his resignation, in June of last year. This gentleman did not come forward, as might have been expected, to render such help as he could to assist his former associates over their present difficulties and to say a good word in behalf of the company with which he had so long been

identified and by which he had been most generously requited; on the contrary, Mr. Lansden has arrayed himself within the ranks of those who sought to tear down and lay waste the business and emoluments of his former employers. Moreover, by reason of the nature of his testimony, Mr. Lansden has caused a report of his statements to be circulated the length and breadth of the land, and the subject-matter contained therein is well calculated to do the utmost harm to gas interests everywhere. Mr. Lansden's statements, as made under oath before this investigating committee, have been telegraphed from one end of the country to the other, and newspapers in many of the principal cities throughout the United States have copied the statements which have appeared in all Washington papers during the progress of the investigation. To what extent is best shown when we say that more than a score of newspapers containing Mr. Lansden's statements about the cost of making and distributing gas have come to our notice since his testimony was given, and the end is not yet. The figures of cost supplied by Mr. Lansden are startling, to say the least, and more than one gas company will, we apprehend, ere long find itself confronted with his figures and compelled to battle hard in an effort to overcome the bad effect on the public mind.

It is because of the general interest that is likely to suffer for Mr. Lansden's indiscretion that we give heed to the matter, not through a desire to extend special favor to the Washington company; nor it is because of any ill will entertained by us for Mr. Lansden. If the cause of the company is just, as we believe it to be, it will come out of the investigation a victor. The present investigation is not the first in which Mr. Lansden has appeared as witness. Only a year ago a similar inquiry, emanating from the same quarter, was instituted against the Washington Gas Light Company. Then Mr. Lansden appeared as a witness in behalf of the company. He at that time occupied the position of superintendent with the company. His testimony then and that of this year are so badly at variance that we should be remiss in our duty if we permit the occasion to pass without directing attention to these differences. Moreover, we should be guilty of withholding from gas managers information which will be of material assistance to them in breaking the force and effect of Mr. Lansden's recent statements.

Under a former resolution of Congress bearing date of 16 February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas at Washington. We herewith give the questions propounded to Mr. Lansden during the investigation of last year and his replies thereto. This we follow with the interrogatories put to him and his answers during the present investigation.

Lansden in 1893.

“Question. What does gas cost to manufacture at your works?

Answer. It costs 48.38 cents per thousand in the holder and 40.09 cents per thousand for distribution.

Q. Can you in any way reduce the cost of gas in manufacturing, so your company could sell for less to the consumer?

A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

Q. How do the prices charged for lamps in Washington compare with other cities?

A. They are as low as any where the same amount of gas is burned to the lamp and the same number of hours lighted in the year and when the company lights and cleans the lamps.

Lansden in 1894.

Q. From your knowledge of the business and condition of affairs here, at what price could the gas company sell gas and pay a reasonable profit?

A. Well, sir, I think they can sell it at \$1 a thousand. That is the reason I came before this committee. I am a gas-consumer to-day, and I have had a good deal of experience, and I think it to the interest of the gas company to stop all these troubles, and they should put the price down to \$1 a thousand and stop the annoyance. They should make good gas and put the price down to \$1.

Q. Will it stop the complaints?

A. Not entirely. You never will do that. * * *

Q. What is the result of your experience, if you are able to submit a statement to the committee? Leaving out of consideration the interest on investment and plant, etc., what is the actual cost per thousand for the production of gas in the city of Washington?

A. Do you mean what it can be made for?

Q. What did you make it for under your management?

A. Without counting interest, you mean?

Q. Without counting the interest on investment.

A. It can be put in the holder, with the present modern machinery which the company has, for about 32 cents. With the proportion they are making now of water gas and coal gas, I think it ought to be distributed for 20 or 22 cents a thousand. * * *

Q. What is the next item of cost after putting it in the holder?

A. Distribution. After it is put in the holder it is drawn out by the consumer, and then there is the expense of inspectors taking the statements, and running what we call the upper offices.

Q. What percentage of cost would that be?

A. I put that between 20 and 22 cents. * * *

Q. That would make this cost 54 to 56 cents per thousand?

A. Yes, sir; I think so.

Q. That includes office expenses?

A. Then come taxes and repairs, and I think it can be easily made inside of 70 cents, counting in repairs and taxes.

Q. Now, does that include everything except interest on investment?

A. Interest on investment comes in the shape of dividends, I consider.'

"From the foregoing extracts of this witness' testimony only one of two conclusions can be arrived at, and we are too sensible of the reader's power of analysis and feel too keenly for the witness to heap coals of fire on the head of one whom, it is only too evident, has allowed his sense of justice to be distorted by real or fancied grievance. The testimony given by Mr. Lansden in 1893 states in effect that there is no way open to his company by which it could reduce the cost of manufacturing gas. In 1894 he tells the committee that, taxes and repairs added—items not considered in the inquiry of the previous year—the cost of gas delivered to the consumer could be brought within 70 cents, or about 18½ cents less per thousand than he quoted as the lowest manufacturing and distributing cost the year before; and yet Mr. Lansden must know that the generating apparatus at the Washington works is the same as when he filled the position as superintendent; that the cost of all materials used, coal, and labor are just the same, save only naphtha, which is now higher in price than when he testified a year ago.

Every man must be the custodian of his own conscience, and it is not for us to decide how Mr. Lansden will reconcile himself to his present unhappy position. If the gentleman has given up all thought of again associating himself with a gas enterprise, possibly he is indifferent to the effect of his predicament, but if he still entertains an idea of continuing his former calling he should lose no time in setting himself straight in the eyes of his former associates. In view of the testimony, we can readily believe this will prove a most difficult undertaking; but there is always two sides to a story, and possibly Mr. Lansden may have in reserve some evidence that will enable him to sustain his present position. If so, our columns are open to him for such purpose."

And thereupon counsel for the defendants offered to read to the jury the correspondence between the plaintiff Lansden and the editor of the *Progressive Age* after the publication of the article hereinbefore set forth, as a part of the *res gestæ* and as explanatory of the position of the plaintiff in regard thereto; but the court refused to permit the said correspondence as a whole to be read in evidence to the jury, upon the ground that any correspondence between the plaintiff and the editor of this paper after the publication of the article referred to could not throw any light upon the issue; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

And thereupon counsel for the defendants, with the consent of counsel for the plaintiff, read in evidence to the jury from the issue of "The *Progressive Age*" under date of April 2d, 1894, an article in the words and figures following, to wit:

"Thou canst not say I did it."

Denial from T. G. Lansden.

Progressive Age has received a letter from Mr. Thomas G. Lansden in which that gentleman takes exception to certain statements contained in an article which appeared in our columns for March 1st, entitled "The acrobatic performances of Lansden." Mr. Lansden says:

"That part of the article referred to beginning with the words 'the present investigation,' in the seventh line of the second column, on page 79, down to 'Lansden in 1894,' 35 lines below, in the same column, is absolutely false. I cannot have given the testimony charged, first, because I did not know of my own knowledge the actual cost of gas manufactured or distributed by the Washington Gas Light Company; second, because I did not appear as a witness before any such committee, on behalf of the company or otherwise; and, finally, because my best information, after inquiring, is that there was no such committee of investigation appointed or in existence in 1893.

Yours respectfully,

(Signed)

T. G. LANSDEN."

Counsel for the defendants thereupon offered in evidence a letter from T. G. Lansden to E. C. Brown, president and editor of the Progressive Age Publishing Company, dated New York, March 21st, 1892, and the answer thereto by E. C. Brown.

And thereupon counsel for the plaintiff withdrew his objection to the introduction in evidence of the letters of the plaintiff Lansden, but insisted upon his objection to the letters of E. C. Brown, the editor, to the plaintiff.

And thereupon, upon the withdrawal of the objection of counsel for the plaintiff, the court admitted in evidence, on the offer of defendants, the letters from the plaintiff Lansden to E. C. Brown, the publisher of the Progressive Age; which said letters are in the words and figures following, to wit:

"To the Progressive Age Publishing Company, E. C. Brown, president and editor:

In an issue of the Progressive Age bearing date New York, March 1st, 1894, there appeared an article under the head-line of "The acrobatic performances of Lansden." That article concerns me and is a libel upon my character, and I propose to follow the matter up fully. I ask you to give me at once the name of the author or authors of that article and his or their place or places of residence, together with all sources of your information concerning the facts stated in that article. I also demand that you make a full and immediate public retraction of the statements contained in that article which in any way reflect upon my character or conduct.

Dated New York, March 21, 1894.

T. G. LANSDEN.

Please send any answer you may make to 705 Temple court."

"NEW YORK, March 23rd, 1894.

E. C. Brown, Esq.

DEAR SIR: Replying to your communication of the 22d instant, I have to repeat the requests to which your letter is an acknowledgment, but not an answer, and also to point out to you wherein your journal has misstated the fact upon which you base your libel and in-uendo, viz:

I have no information—and desire it—respecting the 'St. Louis exploit' the article leaves to be inferred.

That part of the article referred to beginning with the words 'the present investigation,' in the seventh line of the second column, on page 79, down to 'Lansden in 1894,' thirty-five lines below, on the same column, is absolutely false. I could not have given the testimony charged, first, because I did not know of my own knowledge the actual cost of gas manufactured or distributed by the Washington Gas Light Company; second, because I did not appear as a witness before any such committee, on behalf of the company or otherwise, and, finally, because my best information, after inquiry, is there was no such committee of investigation appointed or in existence in 1893.

Yours respectfully,

T. G. LANSDEN."

Telegram.

"WASHINGTON, D. C., March 31, 1894.

E. C. Brown, Progressive Age Pub. Co., 280 Broadway, N. Y.:

Publication proposed in your letter 26th inst. will not be accepted as any satisfaction if names of the authors of the scandalous statements complained of continue to be withheld.

T. G. LANSDEN."

"NEW YORK, April 26th, 1894.

E. C. Brown, Esq.

DEAR SIR: Your letter of April the 4th received. You state therein that 'the ethics of journalism prohibit the furnishing of the names of parties who offer newspapers information respecting matters that are published, and we cannot violate the established custom.' My object in demanding of you the names of those furnishing you the information upon which you based your article of March 1st, 1894, was to be fair with you and to give an opportunity to me to place the responsibility upon the shoulders where it should rest. Your 'ethics' restrain you, and it now remains to be determined if your rule of duty is in any high sense ethical. You further write, 'I would say to you that there is no author for the matter other than your own handwriting. Do you deny it?' I answer, decidedly, Yes; I do deny it. Now, let us be frank and fair. I have made the denial, and I defy you to produce any writing of mine which will sustain you in your assertions of March the 1st, 1894.

Please produce any such evidence as you claim to possess, and do not hide under simple assertions. I now give you an opportunity to do so and to have such pretended evidence submitted to the inspection of your representatives and mine at such an early date as you may fix.

Yours truly,

T. G. LANSDEN."

"NEW YORK, April 14th, 1894.

E. C. Brown, Esq., president and editor Progressive Age.

DEAR SIR: Replying to your letter of the 11th inst., will say that I will name your office at 280 Broadway as the place and April 17, 1894, at 11 o'clock in the forenoon, as the time for the inspection of the paper mentioned in your last communication. I will attend at that time and place with my counsel and will meet your representative and you for the above purpose.

Yours truly,

T. G. LANSDEN."

And thereupon counsel for the defendant- offered in evidence all the letters written by E. C. Brown in reply to the letters written by plaintiff, heretofore introduced in evidence; but the court overruled the said offer and refused to permit the said letters to be read in evidence to the jury; to which ruling of the court the defendant-, by their counsel, then and there duly excepted.

And thereupon, in explanation of his ruling in rejecting all of the letters from Brown to the said plaintiff, the court said:

"I want it understood that that is simply my ruling upon the letters as a whole. If you say there is any passage in any one of those letters that is material, I wish you would call it to my attention. I may find some passage there that is material, and I would not want to say that there is not some particular passage there that might be material. I will consider the ruling as a ruling upon the offer of all the letters together, because offering one letter and another and another is the same as offering them all together. If you find anything in any of these letters that you think material you can call it to my attention at any time during the trial."

And thereupon the defendants, by their counsel, offered to read in evidence to the jury a letter from E. C. Brown to T. G. Lansden, the plaintiff herein, dated March 22d, 1894; a letter from E. C.

21 Brown to Thomas G. Lansden, Esquire, dated March 26, 1894; a letter from E. C. Brown to T. G. Lansden, dated April 4th, 1894; a letter from E. C. Brown to T. G. Lansden, dated April 11th, 1894; a letter from E. C. Brown to Thomas G. Lansden, dated April 16th, 1894.

Counsel for the defendant- offered to read in evidence what purported to be copies of the said letters to the jury separately and severally; but the court overruled the said offer and refused to permit the said letters to be so read in evidence to the jury; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted as to each letter; which said letters are in the words and figures following, to wit:

"NEW YORK, *March 22, 1894.*

T. G. Lansden, Esq., care room 705 Temple Court bldg., city.

DEAR SIR: I have your favor of the 21st inst. In reply thereto I would say that the issue of *Progressive Age* for the date March 1st contains an article entitled 'The acrobatic performances of Lansden.' Newspapers are responsible for their utterances. Neither this journal nor its publisher has desire to escape responsibility for its statements in connection with the article referred to by you. In response to your inquiry for the source of the editor's information and facts as stated in the said article, I would say that for the most part the same are matters of public record and you certainly must know where to search therefor.

In answer to your demand that this journal 'make a full and immediate public retraction of the statements contained in the article' above mentioned, I would say that if you will point out to me the manner in which this publication has done you injustice by the recital of facts and statements which appear in the article to which you object I will only too gladly make as full and satisfactory retraction as you may wish. You have only to inform me wherein we have fallen into error in the, to you, objectional publication to secure the most prompt acknowledgment on our part.

Furthermore, I repeat to you what was in effect published in the closing lines of the article of March 1, that *Progressive Age* tenders you gratis all the space you may deem necessary to give your version of the Washington affair, and, if accepted on your part, we will accord it the same prominence as was given to the former article.

Trusting that you will avail yourself of the suggestion just above made, or that you will, at any rate, point out to me wherein we have done you injustice, that I may become acquainted with the particulars of said article to which you take exception and for which you demand retraction, I am,

Very truly yours,

E. C. BROWN."

"NEW YORK, *March 26, 1894.*

Thomas G. Lansden, Esq., care 705 Temple Court, city.

DEAR SIR: Replying to your letter 23d inst., I beg to say that *Progressive Age* in its next issue (April 2) will publish that portion of your letter of 23d which constitutes your denial of certain statements contained in our article of March 1 to which you have taken exception.

Thanking you for bringing the matter to our attention, thus enabling me to make public your refutation of such portions as you object to, I am,

Very truly yours,

E. C. BROWN."

"NEW YORK, *April 11, 1894.*

T. G. Lansden, Esq., care 705 Temple Court, N. Y. city.

DEAR SIR: Reply to your letter of the 6th inst. has been delayed because of the writer's absence from the city.

In answer to your request to submit a certain document which we claimed was written by you, bearing out certain statements which we have accredited to you, I would say that I am prepared to accept your challenge, and will allow you to name the time and place where said document, the authorship of which you deny, can be submitted to our respective representatives to establish its genuineness.

Very truly yours,

E. C. BROWN."

"NEW YORK, April 16, 1894.

Thomas G. Lansden, Esq., care 705 Temple Court, city.

DEAR SIR: Your letter of the 14th inst. was handed in at my office this morning by your messenger.

My letter of the 11th inst., in which I expressed willingness to submit to our respective representatives a certain document for the purpose of passing upon its genuineness, was written, as I informed your process-server, before I was served in your suit. Moreover, your process was in the hands of your man for service upon me on as early as the 9th inst., although I was not aware of that fact until after the process-server had departed, after having served his paper upon me.

I wish now to assure you that had I known that you had taken action at the time I last wrote you (11th inst.), I should not have made the proposition contained in said letter. In view of your action, I respectfully decline to exhibit the document until the trial of the case.

Any further communication you may desire to make to me relative to the controversy between us you will please address to my counsel, Hon. Charles E. Lydecker, Equitable building, 120 Broadway, city of New York.

Yours truly,

E. C. BROWN."

The defendants excepted to the overruling of their offer in evidence of the letters of said E. C. Brown in answer to the letters of Thomas G. Lansden, admitted in evidence on their offer and consent of plaintiff, on the ground that these letters of Brown were part of the *res geste* in the case, and that the reading of one part of a correspondence to a jury without the answers thereto being read tended to confuse the jury and injure the case of the defendants, and on the further ground that the letters themselves, when offered in evidence as a whole and singly, would tend to show the responsibility of the editor of the paper and the absolute lack of responsibility on the part of these defendants.

But before any of the letters of Lansden were read in evidence counsel for the defendants were informed by the court that the mere fact of the admission of those letters would not entitle them to put Brown's letters in evidence if objected to.

And thereupon the plaintiff, THOMAS G. LANSDEN, further to maintain the issues on his part joined, testified in his own behalf that he was a resident of Washington and had been such since 1886;

that, prior to that time, for 11 years he resided in St. Louis, Missouri; that he is a gas engineer by occupation; that a gas engineer is a man who constructs and manufactures gas works and manufactures gas; that he had been so engaged for about 30 years, mostly in the West; that he had constructed works through Illinois, Iowa, Wisconsin, and Missouri; that, before coming to Washington, he was engaged in gas works at St. Louis, which place he left to take charge of the Washington gas works; that during the 11 years of his residence in St. Louis he was connected with the gas works as engineer and superintendent of the St. Louis gas works; that he was solicited to make application for the position with the Washington Gas Light Company; that a position was offered to him here and he came on to Washington to have a talk with Mr. McIlhenny, and he thereupon made arrangements to come here; that he came here because he was offered the position of superintendent of the Washington Gas Light Company; that he held that position from 1886, November 1st, until the first of June, 1893; that he belonged to the gas association and organized the western association, which is one of the largest associations; that he had never had any trouble with any of them; that they were all friends of his, so far as he knew; that prior to March 1st, 1894, he never was out of a position; that he knows of a publication called *The Progressive Age* and has read the article therein in the issue of March 1st, 1894, headed "The acrobatic performances of Lansden;" that a copy of the paper was sent to his house, while he was absent, through the mail; that it was nearly a month after it was published before he saw it; that he knows John R. McLean, who, during February and March of 1894, was the president of the Washington Gas Light Company; that he knows Charles B. Bailey, who was, during the same period, the secretary of the Washington Gas Light Company; that William B. Orme was the assistant secretary of the Washington Gas Light Company, and John Leetch was the general manager of the Washington Gas Light Company; that Mr. Leetch became connected with the defendant company in March or April, 1893; that he is unable to state what the reference "until a very recent date, assuming his St. Louis exploit to have been overlooked and pardoned," refers to; that he never had a word with anybody in connection with the St. Louis Company; that his severing of his connection with the company in St. Louis was entirely voluntary, and that the president of that company held his resignation for four months after he supposed it had gone in; that at the first meeting of the board of the St. Louis Gas Company, after he came here, a letter was written to him, without any request on his part, of a complimentary character.

And thereupon counsel for the plaintiff called the attention of the witness to an extract from a letter written by Mr. Leetch, general manager of the Washington Gas Light Company, under date of February 13th, 1894, as follows:

"Under a former resolution of Congress, bearing date February

8th, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of the price of gas in Washington."

Thereupon the said witness testified that he never was before any committee in 1893 in regard to the investigation of the Washington Gas Light Company in regard to the price of gas or anything of the kind; that he did appear before a committee of Congress in 1894, which was the only time that he ever appeared before a committee; that in 1893 Mr. McLean, the president of the company, attracted his attention one morning to the sundry civil appropriation bill that was being gone over by the House.

And thereupon, in response to interrogatories propounded by counsel for the plaintiff, the said witness testified as follows:

"Q. You can only tell what Mr. McLean said to you?

A. Mr. McLean was telling me this, and that a resolution to put the price of gas used by the Government here down to 75 cents a thousand had been passed. He told me that he wanted me to go before the committee. He said, I don't know what kind of a witness you would make, but I wish you would write me out something here by which I could get up some questions to give a committeeman to question you on. I went to my office and sat down with my pencil and wrote out a series of questions and answers—'What is your name?' and my experience and all this and that. I carried it up to the office, and Mr. McLean read it over. He said, You say nothing here about the price of gas—the cost of gas. I said, If they ask me that, that must come from you. He went into Mr. Bailey's office and brought out some figures. They were put down in the memorandum, towards the latter part of it, in cents and hundredths of cents, which, as I had never seen the books of the company as to the cost of distribution, &c., I could not possibly have given of my own knowledge at all.

Q. Why did you tell him that the items of cost must come from him?

A. Because he and the secretary are the only ones that know anything about it. The engineer and superintendent, unless he has charge of those books, never knows the cost of gas.

Q. I hand you a paper produced by the other side and ask you whether that is the memorandum to which you refer.

25 A. That is it. There is no date to it. It is on my office paper at the gas works.

Q. In this memorandum the cost per thousand, as stated, in the holder appears to be put at 48.38 cents.

A. Those were figures that were given to me by Mr. McLean.

Q. What data or material had you for getting down to the hundredths part of a cent?

A. I have no books in my office at all that give the exact cost of gas. I can approach it closely at the works by knowing what my labor is a day and what amount of coal is used; but there are hundreds of little bills that come in that I certify to at the end of the month, and they are all concentrated in the books at the prin-

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cipal office; so that to get at the actual cost of gas a man must have control of the books.

Q. In this paper the cost of distributing is put at 40.09 cents. What had you to do with the cost of distribution?

A. I never saw the books. It is only my general knowledge of what I think it ought to cost."

And thereupon the said witness, in response to interrogatories propounded by counsel for the plaintiff, testified that his experience, from having had charge of gas works and of distribution, would enable him to approximate the cost of production; that he had no way of bringing it down to the exact cost, but could do so approximately; that what is called the cost of the manufacture of gas is the cost of putting it into the large gas-holders; that the cost of distribution is the cost of the work from the time it is drawn out of the holders until the gas bills are collected, including office expenses, salaries of clerks, street mains, service pipes, meters, etc.; that when the data as to cost was handed to him by Mr. McLean he said to Mr. McLean, "It cannot be possible that your gas costs that much;" that Mr. McLean said they were entitled to charge interest on the investment, and the witness then said, "It don't make any difference to me. If the committee asks me, I will give them to them as your figures;" that it would be very hard to state to the jury the effect upon him of this publication; that he never had a word with the company, and, as far as he knows, his record as an upright, straightforward man in business has stood up until the present time; that he has never before been charged with perjury; that he made no effort to get a position until almost a year, in consequence of the sickness of his wife, who was seriously ill and died about that time; that after her death he answered three or four advertisements for positions and received no answer from any of them; that he opened an engineer's office in St. Louis, where he had been accustomed to building works, and had never had any applications but one, from parties for whom he had charge of works 25 years ago; that the publication of this article affected him mentally; that a man of his age, having the reputation that he had, would naturally feel in an unpleasant condition, in consequence of such a publication, until he could meet it; that in the evidence he gave
26 before the committee in 1894 he had no feeling against the company; that after he left the employ of the gas company he used to go to the office, and that his mail came there for quite a length of time; that he did not go before the committee in 1894 for three or four weeks after the investigation was going on, and that he did not go until the last day of the committee and then at the solicitation of certain parties; that he believed that, being a resident, he had the privilege of going before the committee when citizens were invited to come, and that he did go before the committee in 1894.

And thereupon, on cross-examination, the said witness, in response to interrogatories propounded to him by counsel for the defendant, testified that the memorandum which he had examined

was all in his own handwriting; that he gave the said memorandum to Mr. McLean, at his request.

Counsel for the defendant- thereupon gave in evidence the memorandum above referred to, which is in the words and figures following, to wit:

"Name: ———.

Occupation: ———.

How long have you been connected with the Washington Gas L't Co.?

Six and a half years.

Have you had other experience with gas Co.'s before coming to Washington?

For the ten years previous to coming to Washington I was eng'r & sup't of the St. Louis Gas Co., and for the twelve years previous to that I was building and run-ing gas works throughout the West.

Are you familiar with the prices and quality of gas furnished by the leading cities of this country?

I am. I have visited the works of every city of size throughout the United States.

How do the works and methods of manufacturing gas at the Washington Gas L't Co. compare with works and methods of other cities?

They are equal to any and superior to many of those of other cities.

How do the prices charged by the Washington Gas L't Co. compare with prices charged by the companies of other cities?

They are as low as any city where material for making gas is of like cost. Some of the cities get material for less than one-half the cost it is to our company.

Name some of the cities so favored.

Cincinnati and Cleveland, Ohio.

What city or cities furnish the highest C. P.?

New York city, I think, furnishes about as good gas as is made in this country.

How will the gas supplied by your company compare with New York?

I think we make as good gas as is made in any city. The methods of testing in Washington are different to other cities.

27 What is the price charged for gas by the leading cities of this country?

New York charges.....	125
Philadelphia... ..	150
Baltimore.....	125
Chicago.....	125
St. Louis.....	125
Boston.....	125
Washington.....	125

What is the material used for making gas in Washington?
Coal and nap-tha oil.

What is the material used in other cities?

New York principally oil; some coal.

Philadelphia, oil & coal.

Baltimore, oil; Chicago, oil; St. Louis, coal and oil; Boston, oil mostly.

Has there been much complaint of your gas at your office recently?

There has been complaint within the past few weeks during the cold weather of about one-half per cent. of our consumers. What they generally call bad gas is a want of pressure occasioned by the excessive cold weather.

What effect does the cold weather have on the gas?

All illuminating gas, by whatever *known method* made, contains an aqueous vapor. When the pipes are exposed by crossing aries or otherwise, this vapor forms a fine frost on the inside of the pipes, which checks the flow of gas. A great many of our meters are exposed, as we have no inspection in Washington. The gas-fitters usually set the meters where they please.

All other cities have inspection of gas-fitting?

Washington is the only city where gas is used that has no inspection.

Do you receive daily notice of the quality of your gas from the United States inspector?

Yes.

Do these reports show you are complying with the law?

They show we are doing much better than the law requires. They sometimes show four-candle power over the standard, and for the past two or three years the average has been over two candles above the requirement.

Do you make any difference in the quality of the gas furnished during the session of Congress to that furnished when Congress is not in session?

We never have, but this winter, since Nov. 1st, our new management instructed me to make the best gas I could. We have, since Nov. 1st, when our new plant was put in action, made a better candle power than before, but this is purely a business matter for competing with electricity; we will not reduce the candle power when Congress adjourns.

28 Was there not complaint of your gas before Congress met this winter?

About the 1st of Nov., when we started our new plant at 26th & G Sts. N. W., we had, for a few days, some trouble. As the process was new, it took our men a few days to learn how to handle it, yet at no time did we go below the standard.

What does gas cost to manufacture at your works?

It costs us 48.38 per thousand in the holder and

40.09 " " for distribution.

Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

I know of but one way that a small amount might be saved. That

is by reducing the salaries of our clerks and the price paid to our laborers; this we would not like to do.

How does the prices charged for lamps in Washington compare with other cities?

They are as low as any where the same amount of gas is used to the lamp and the same number of hours lighted in the year, when the company lights and cleans the lamps."

And thereupon the said witness, in response to interrogatories propounded by counsel for the defendant on cross-examination, further testified that, in order to make the answers contained in said paper, he never looked at the books in the office; that the memoranda were written up for Mr. McLean to get up some questions from, and that the item in the back of the paper, where the price was put down, was furnished by Mr. McLean; that everything in the said paper comes from his own experience with the exception of the items as to the cost of gas; that it was a paper never to be seen by anybody but Mr. McLean, and he does not recollect what was in it; that it was to be used by Mr. McLean as a guide to get up questions to go to a committeeman in Congress; that what Mr. McLean put in he does not know, and what he left out he does not know; that he is willing to have the whole paper read to the court; that the statement in the paper, "it costs us 48.35 cents in the holder and 40.09 for distribution," came from the books in the office; that the item in regard to what it cost for distribution came from the books, and that if he had been required to make it as an expert he could not have put it to a hundredth of a cent; that he never saw the books from which those items came before or after he left the service of the company.

And thereupon the following took place:

Q. The question here is "What does gas cost to manufacture at your works?"

— "It costs us 48.38 cents per thousand in the holder and 40.09 for distribution."

— Where did the item in regard to the cost per thousand in the holder come from?

A. It came from the books in the office.

Q. And the item in regard to what it cost the holder for distribution?

29 A. Certainly, because I never knew. If I had gone to make it as an expert, I should certainly not have put it in hundredths of cents, you know.

Q. Did you ever see those books from which those items came?

A. Never, sir.

Q. Did you ever see them after that time?

A. Never.

Q. Did you ever see them after the time you left the company—these books from which these items were taken?

A. No, sir; I never did.

Q. To the best of your knowledge, then, that was true at that time, was it not?

A. I don't know anything about the cost of gas. It is, to the best of my knowledge. The figures were furnished me, because when I wrote the paper the figures were not in it. It took it up to the office, and Mr. McLean said, You have got to have something about the cost of gas. I told him he must furnish those figures himself.

Q. When this paper was made up by you did you expect to be called before an investigation of Congress?

A. Yes, sir.

Q. And testify under oath?

A. If the committee called for it under oath. Some were statements and some were under oath; but I did not expect to have that paper handed to a committeeman, because it appears on its face that it was not intended for a committeeman.

Q. Did you not say you were to get up a copy of questions to be propounded to you?

A. That is what Mr. McLean said he wanted to do.

Q. Did you not expect these same questions would be asked you?

A. The most of them I expected; yes—if they were the kind that satisfied him.

Q. Did you not expect to give the answers that are written down here in your handwriting?

A. Yes, sir.

Q. They are true, are they not?

A. I expected to give them if they were asked for.

Q. They are true, are they not?

A. Those in regard to the cost of gas—I especially spoke of that.

Q. I ask you are the other answers that you give to these questions here true?

The COURT: He means the answers other than those in relation to the price.

A. If you read the questions I can tell you.

Q. You testified here that you told Mr. McLean that if you were asked on that investigation you would have given those figures. Is that so?

A. Certainly. I would say that is what is furnished me by the president of the company or the secretary, not of my own knowledge. I have always testified before every committee I was
30 ever before in my life, except where I had charge of the books, as an expert.

The COURT:

Q. You would estimate the cost instead of giving the actual cost?

A. Certainly, sir; I have never in my life given the actual cost of gas before any court or investigating committee of any kind.

That he left the gas company on the 1st of June, 1893; that after Mr. Leetch had been with the company about a month plaintiff asked the privilege of taking his wife to New York under the

advice of his physician ; that she was dying with an incurable disease, and he asked for a vacation of a month ; that after his return from his month's absence Mr. McLean called him in and said, "Launsden, there are a dozen situations open to you. I see what unpleasant surroundings you have, and I thought if you would just tender your resignation I would give you a check for about two thousand dollars." I said to him, Discharge me. He said, "No : I never would discharge you." I said, "That is only whipping the devil around the stump ; give me your check and I will give you my resignation, but I will say nothing about the unpleasant surroundings ;" that he did not ask for three months' salary on account of his wife's sickness ; that he never saw the books containing the figures as to the cost of distribution of the Washington Gas Light Company ; that when he testified before the investigating committee in 1894 he did not testify to what they did, but to what he believed as an expert, and from his knowledge of the St. Louis works, where he had charge of the distribution, could be done ; that the distribution in St. Louis cost 25 cents, which was thought high there, and that he, witness, testified that distribution could be done for about 20 to 22 cents ; that before that committee he did not give the figures of the Washington Gas Light Company and did not purport to do so ; that he testified before the committee he was a consumer of gas and had been such for many years, although he was not paying gas bills while in the employ of the company ; that he had a talk with Mr. McLean once for a few minutes about reducing the price of gas ; that he knew no more about the actual cost of the distribution of gas in 1894 than he did in 1893 ; that Mr. McLean never asked him to prepare a paper of questions and answers, but did tell him to write up a paper in order to have something to go by, and he got it up in that shape of his own accord ; that Mr. McLean said he wanted it for some party who was getting up some questions ; that he did not know what kind of a witness witness would make and requested him to write out a paper of some kind and show it to him ; that he, witness, wrote it out in pencil just as it stands there and gave it to Mr. McLean ; that he, witness, was not before the Senate appropriation committee with Mr. McLean in 1893, or before any subcommittee ; that when the said paper was brought to Mr. McLean the question as to the manufacture of gas was not in it ; that the cost of gas was given to him
31 either before he wrote the paper or before he finished it ; that when he brought the paper up the remark was made that they would ask him about the cost of gas, and he said, "Then it must come from you ;" that they furnished it to him and he put it in there in pencil like all the other questions ; that in answer to the question, "Can you in any way reduce the cost of gas in the manufacture so that your company could sell for less to the consumer?" he wrote the answer, "I know of but one way that a small amount might be saved and that is by reducing the salaries of our clerks and the price paid to our laborers, and this we would not like to do ;" that that question was not written before the question as to the cost of the distribution of gas ; that at the time of writing

that answer he believed gas could be made for less than those figures, according to his private opinion; that at that time the new improvements at the old works were not completed; that he did not know of any other way to reduce the cost, because it could not be made cheaper with the machinery he had; that in 1894 different machinery was put in at the G Street station, which was started some time in the spring of 1893, and had only been running a short time; that in his evidence before the committee of Congress he stated that gas in 1894 could be made for a certain price, and that he then had reference to the complete machinery in both stations, and said that with the present modern machinery gas could be made in Washington for a certain price; that the basis upon which he made his answer to the committee of 1894 was upon the change that had been made in the works, and it could in 1894, in his opinion as an expert, be made cheaper than prior thereto; that he had learned nothing in regard to the distribution of gas between 1893 and 1894; that he had not seen the books and had no talk with anybody and no information at all; that what he said about the cost of distribution of gas in 1894 was based upon his experience; that in 1894 he testified before the committee of Congress that, without counting interest on the investment, gas, with the present modern machinery which the company had, could be put in the holder for about 32 cents, and that with the proportion they were making of water gas and coal gas it could be distributed for from 20 to 22 cents a thousand; that this was his opinion as to what it could be made for in 1894, due to the change in machinery and not due to any change in the reduction of salaries, the payment to laborers, or to any improved form of distribution; that after he severed his connection with the defendant company, he went back to the office, mostly to the lower office, where the complaint department and distribution office were; that he had left orders to have his mail left there and called and got it; that he knows H. J. Entwisle, a young man who had charge of the distribution in the office at that time, but that he did not talk to him about leaving the gas company; that he did not say to him the gas company had got the best of him now, but that he was going to meet them on the hill in the winter time; that he knows R. W. Falls,

who worked in the office; that he did not say to him that
32 he was going to fight the gas company on dollar gas and would bring gas down to a dollar, that he would meet them on the hill; that he may have said to him that gas should be reduced; that they did not get the new machinery finished at the G Street station until late in 1892; that they started, he thinks, but were not successful and did not run in 1893 for any length of time with the new improvements; that they could make gas cheaper with the new improvements than they could before they were put in; that he left in 1893, and that the machinery at the G Street station was working at that time; that he left on June 1st, 1893, and they stopped it immediately after he left and made a change; that it lay idle for several months; he don't know how long; that the new machinery is what is called the Wilkinson process, and it

did not work well; that they got it started late in the winter of 1892 and it was laid off for a while; that they tried to get along with it until the spring or summer time in order to make changes; that it was not working successfully; that he believed it was an economical process; that he based his statement of the cost in 1894 upon the machinery that the gas company owned, and said that they could afford to make gas at so and so; that when he wrote the questions and answers for Mr. McLean and said that it could not be manufactured any cheaper he meant to say he could not manufacture it any cheaper than it was manufactured; that he wrote those answers some time in the latter part of January, 1893, after a resolution had been offered to reduce the price of gas to 75 cents—a day or two after that; that after he left in June, 1893, he had no opportunity of testing that machinery to find whether it was working successfully or not; that the machinery was an exact duplicate of what he had been running for four years at the new works; that in 1894, when he appeared before this committee of Congress to testify, the machinery at the G Street works had not been in operation for several months; that it had not been working for some time after the spring after he left; that he presumed it was working successfully, but did not know; that he passed there and saw the thing working, but did not go into the works; that he did not have any of the figures in regard to the cost; that his testimony before the committee of Congress was as an expert and was his opinion as to what gas could be made for with the machinery they already had; that the time he testified before a congressional committee in 1894 he testified to what he thought gas could be distributed for, and that he based his knowledge of the cost of distribution on his knowledge of the distribution in the St. Louis works that he had had charge of; that witness had been told by the secretary of a large gas works that his distribution was as low as 16 cents in one of the large gas works in the United States.

And thereupon the witness further testified that when he got the check from the gas company he received the money for it; that part of it was for salary that they owed him, but he does not recollect how much.

33 And thereupon the witness further testified that he did not know the actual cost of manufacturing gas in 1893; that he never knew that; that he never saw the books; that the upper-office books would give that; that he could approximate the cost of manufacturing gas—the cost of it in the holder—in this way: He knew the cost of the coal, the oil, and the labor, by the month; that his bills for gas-fitting and labor bills, which is sometimes \$30, \$40, \$50, and sometimes up in the hundreds of dollars for material that they would buy, that came to him; that he would certify these bills and take them to the upper office; that he had no books of entry, but these items would go in as the cost of gas; that he never knew the actual cost of it, and could not know it unless he had access to the books of the company or unless he had charge of the books of the company; that he could approximate very closely to what it cost in the holder while he had charge of the

different places; that he had read the charge in the Progressive Age, which constitutes the charge of libel in this case; that he read the article in that paper containing this sentence: "In view of the testimony we can readily believe this will prove a most difficult undertaking. But there are always two sides to a story, and possibly Mr. Lansden may have in reserve some evidence that will sustain his present position; if so, our columns are open to him for such purpose;" that the only explanation he made to the editor of the Progressive Age in regard to the testimony that he had given before the investigating committee in 1894 was the letter to Mr. Brown; that that is the only time he denied he went before any committee; that he denied in that letter that he knew the actual cost of gas, and also said that, to the best of his knowledge, he did not know there was any committee investigating the gas company in 1893; that the persons at whose request he appeared before the committee were not members of the gas company; that he appeared of his own volition and at the request of certain parties after the examination had been going on for several weeks.

And thereupon said witness further testified on redirect examination that he cannot tell how early after the original libel of March 1st he wrote this letter of explanation, which appeared in the issue of April 2d; that he did not wait as long as a month to enter his denial, but they followed one right after the other. There were ten or fifteen of them; that the paper is published twice a month, and it was following the second letter—a day or two after he made the attempt to get the names of the parties who furnished the original information; that when he wrote the alleged answers he made no estimate of the cost of putting gas in the holder in 1893; that he got that from the president of the company; that the statements in these answers were given to him by the president of the company, and when he gave them to him he, witness, said, "It can't be possible that gas costs that much, but it don't make any difference to me. If the committee asks me any questions, I will give it to them as your figures;" that if called as a witness he would have given these figures as coming from the president of the company, and would have supposed they were correct; that Mr. Leetch

34 was not connected with the gas company at the time these answers were written; that when he (witness) left the employ of the gas company he was general superintendent and was employed by the year; that he came there on the first of November, and that his year was up on the first of November; that the amount of money that was paid him when he left did not pay his salary up to the end of the then current year; that he did not give a copy of the answers to anybody else but Mr. McLean, and gave them to him in his private office; that he never saw them again until he saw them here on this trial; that when he spoke of the new works being a duplicate of the old works he had reference to the process of manufacturing gas; that what he called the new works was out by the navy yard; that they put in a process there that had never been used before in Washington; that after they ran them for three or four years then they put in

a duplicate of the new machinery in the old works, on G street; that it was put in in 1892, but it was not completed until along in November some time; that in 1892 it was no longer a new process, but it was simply a copy of what they had in the works at the navy yard; that it was or intended to be identically the same machinery that they were using at the new works.

And thereupon the said witness further testified that his salary as gas engineer was \$5,000 a year; that he received this amount in St. Louis for 8 or 10 years before he came here for the same salary he was receiving in St. Louis; that he was with the company here for about 7 years; that he came here on the first of November, 1886; that he had been receiving \$5,000 a year for 17 or 18 years before this article was published.

And thereupon the following questions were propounded to the said witness, and he answered them as follows:

By Mr. DARLINGTON:

Q. What knowledge have you of the financial condition of the Washington Gas Light Company?

A. All the knowledge I have is the dividends they pay.

Q. Are you a stockholder?

A. I am not now.

Q. Have you been?

A. I have been.

Q. Were you one in 1893 and 1894?

A. Yes; I had some stock in 1893 and some in 1894.

Q. What is the total capital stock of the company?

A. Two million dollars is what it is capitalized for.

Q. Two million dollars?

A. Yes, sir.

Q. What dividends have been paid on the stock within your recent knowledge?

Mr. WEBB: We object to the extent of this examination. It is perfectly well known that the gas company is able to pay the amount claimed in this libel case, and what dividends they pay is a matter private to the company.

35 Mr. DARLINGTON: I am seeking to show only its earning capacity.

Mr. WEBB: We will admit that the company is able to pay this amount claimed.

The COURT: Still they have the right to show the volume of the property of the company, and any evidence tending to show the volume of the property would be competent.

To which ruling of the court counsel for the defendants then and there duly excepted; which exception was then and there noted upon the minutes of the court.

And thereupon the said witness was asked the following questions:

(By Mr. DARLINGTON:)

Q. You can tell us what you know in regard to the dividends earned on this stock in the last two years. What were the regular dividends?

A. They paid a regular dividend of 10 per cent.

And thereupon counsel for the defendant interposed an objection to the said question being asked on the ground that it was immaterial and irrelevant, and to any answer thereto being given to the jury; but the court overruled said objection and permitted said question to be asked and answered; to which ruling of the court the defendant, by its counsel, duly excepted; which said exception was then and there noted upon the minutes of the court.

And thereupon the following proceedings were had:

Mr. BROWN: After the admission that the gas company is able to respond to the amount that is claimed, is it necessary to go on with this testimony?

The COURT: I do not think the admission of a fact that it is able to respond to damages amounts to anything. The object of this evidence is, as Mr. Darlington says, to furnish the jury the basis upon which they may calculate exemplary damages if they are entitled to exemplary damages, as is claimed. If the jury are going to give exemplary damages, they might give much larger damages against a very wealthy person than they would against a person of ordinary circumstances.

Mr. WEBB: Their claim here is only for \$50,000.

The COURT: If you admit that if they are entitled to a verdict at all they are entitled to \$50,000, that does away with the necessity of the evidence; otherwise I think it would be admissible.

To which ruling of the court counsel for the defendants duly excepted; which exception was then and there noted upon the minutes of the court.

And thereupon said witness further testified that he knows what dividends have been paid by the gas company since 1890, but does not know what has been earned; that every year they have paid ten per cent., which amounts to \$200,000 a year; that in 1893 they paid \$300,000, which was 15 per cent.; that that was an extra dividend; that in 1894 he knows of no extra dividend; that in 1895 they paid \$400,000—an extra dividend; that in 1890 it was not a cash dividend that was paid; that \$600,000 was issued in certificates of indebtedness—\$6 on each share of \$20; that from 1890 down to the present time they have paid the regular ten per cent. dividend every year; that in 1890 they issued \$600,000 of interest-bearing certificates to the stockholders, which would make it 40 per cent. for that year; that in 1893 there was a special dividend paid of \$3 a share in addition to the 10 per cent.; that in 1894 he does not know of anything being paid but the regular dividend; that in 1895 they paid \$4 a share; that it takes \$200,000 to make

the regular dividend, and they paid \$400,000 extra—\$600,000 altogether.

And thereupon said witness further testified on recross examination that he knew Mr. Thomas Holden; that Holden was a draftsman for him; that he does not recollect whether or not Holden was present in the office of the gas company at any time after he resigned when he, witness, was there; that he never told Holden that he intended to make it hot for the company up on the hill; that he never made any threats to any of the clerks about the office.

And thereupon counsel for the plaintiff announced his testimony closed.

And thereupon the counsel for the defendants moved the court to instruct the jury, upon all the evidence, to return a verdict for the defendants; but the court overruled said motion; to which ruling of the court the defendant, by its counsel, duly excepted; which said exception was then and there noted upon the minutes of the court.

And thereupon the defendants, in order to maintain the issues on their part joined, produced as a witness one JOHN R. McLEAN, who, having been first duly sworn, testified that he was the president of the Washington Gas Light Company and was such president in 1893; that while he was president Mr. Lansden, the plaintiff in this case, was superintendent of the gas company; that he never saw the letter which has been introduced in evidence from Mr. Brown, the editor of the newspaper called The Progressive Age; that he never saw an answer written to it; that he does not remember when he first saw the letter of Mr. Brown and the answer of Mr. Leetch that have been put in evidence, and cannot tell whether it was before the suit or afterwards; that he remembers in 1893 of an investigation that was pending before Congress in regard to the price of gas in the sundry civil bill; that he had a conversation with Mr. Lansden about it; that, knowing very little about the gas business, he asked Lansden to prepare a statement to give him an idea as to what he should testify to—as to what his side of the question would be; that he had more than one talk with Mr. Lansden about it; that he looked to him to give him (witness) information in regard to it; that he looked to him as a gas expert

and would have to rely upon his experience to make their
37 statement and wanted to know what he would say; that this estimate was written on paper, in the form of questions and answers, and contained the cost of making gas; that he does not know what Lansden told him; that he is not positive as to the general conversation; that he was trying to make a defense for the gas company and wanted him to furnish him the information that was necessary, and witness asked him to put this information on paper, that he might have it; that he did not furnish him with these figures and prices; that he did not know the figures; that he does not believe he got this information from Mr. Lansden; that he had no information; that, in fact, he was ignorant of the gas busi-

ness and looked to Mr. Lansden for the information; that he had been president of the gas company at that time four or five months, perhaps; that he thinks he gave the paper that Mr. Lansden gave him to one of the officers of the company; that he does not know to whom he gave it, but whoever it was he asked him to keep it, and said that it would be valuable; that it was an opinion which Mr. Lansden had given him; that witness kept no papers; that when Mr. Lansden gave him that paper he said he would testify to that; that Lansden was giving him that as their defence and what he (Lansden) would testify to; that that was witness' understanding; that there was no condition to it; that this information came from Mr. Lansden as far as witness knows, and witness looked to him for it, and this paper was the result of his request.

And thereupon counsel for the plaintiff conceded that there was no malice against Mr. Lansden at the time he left the gas company's service, in June, 1893.

And thereupon said witness further testified that he had no personal malice or ill-feeling towards Mr. Lansden in 1894.

And thereupon said witness, on cross-examination, testified that at the time these answers were given by Mr. Lansden Mr. Leetch had no positive position with the company; that he had no assignment; that he had just come to the gas company; that Mr. Leetch first had a recognized position with the company after Mr. Lansden had left the service of the company; that he thinks Leetch was on the pay-roll of the company at that time; that he was just generally employed there and familiarizing himself with the company; that Leetch had no positive employment until after Mr. Lansden left; that witness does not think that he was put in exactly the position of Mr. Lansden; that in fact he was appointed generally to take care of the works and to do the best he could for the company; that he was a gas engineer and took care of the works; that witness has never seen the article in the Progressive Age in regard to Mr. Lansden; that he does not know when he first heard of it; that it was after its publication, of course; that he thinks the paper is sent regularly to their office, but that witness does not read it; that he does not know how long after the publication of the article it was that he first heard of it, but that it was some time afterwards; that he did not lose interest in Mr. Lansden or anything relating to him; that he never took any steps in regard to these answers; that they did not concern him. On being asked, "Did you not think it a little remarkable that a private interview that you had had should appear in a New York paper?" witness answered, "It was not given out." That witness, as an officer of the company, gave it—*i. e.*, the paper in Lansden's handwriting—to one of their officers there; that they contemplated its publicity, it becoming public property; that it was a paper prepared for a committee of the House; that they did not contemplate its publication in a New York paper; that he was not surprised to find it published in the New York paper; that it is not a matter of surprise to him—did

not interest him—and that he did not give it a moment's thought; that he denies that he thought anything about the answer which has been made the basis of an attack upon Mr. Lansden in a New York paper being given to a New York paper; that he has never read that article and does not know the contents of it today; that in February, 1893, he did not know what Mr. Lansden's duties were; that they looked upon him as a gas expert, and looked to him for the manufacture of the gas and for general counsel in every way; that any information witness wanted about gas—about its manufacture or its distribution or anything of that kind—he would naturally ask Mr. Lansden for it; that he does not know what items enter into what you call putting gas into the holder; that he has never taken any part in the mechanical part of it or in the manufacture, and knows nothing about it; that he knows the cost after it has been manufactured and has left the holder, but beyond that he does not know anything about it; that Mr. Lansden was the man they generally looked to for everything; that if there was a stoppage in the pipes or an explosion in the streets they would naturally look to Mr. Lansden; that he was their expert man in anything of that kind; that he supposes the salaries of the clerical force in the office come under the distributing department; that Mr. Lansden did not employ the clerks nor did he pay their salaries or have any means of knowing what their salaries were; that witness expected Lansden to give him the cost of distributing gas because he thought that a gas expert would know the general run of the business; that he did not have any one to inquire of about that, and it was the most natural thing that he should have gone to the man who manufactured it and who was an all-around expert to see what it would cost him to make it and what it cost the company to deliver it to the consumer; that he did not expect Mr. Lansden to know about the clerical force, but when he asked him to furnish the cost of making and distributing gas he expected to be informed about what they could afford to make gas for, including all these items; that in getting this information as to the cost of making and distributing gas Mr. Lansden was not confined to his experience at their works; that witness said, "Mr. Lansden, you see what they want to do. They want to reduce the price of gas. We want to bring the best defence we can. Now, what price can we afford to go below, or at what line would the gas company lose money? How close can we go and make a profit?" I asked him to make

39 me some kind of a report, and to please reduce it to writing, so that it would always be available, and we would know just where we stood if we want to make a defence of the company when they say they are going to make a material reduction; that he does not know whether he asked for a general idea of what the cost of gas was or asked him to give the exact cost of it; that he supposed that he read the paper that Mr. Lansden brought him, or heard it read; that he wanted the cost of gas at their own works, and got from Mr. Lansden this answer, in which he gives 48.38 cents in the holder and 49.09 cents for distribution, for he expected to put him on the stand.

And thereupon the said witness, in response to interrogatories, testified as follows :

Q. And you thought he was giving you that information down to the one-hundredth part of a cent ?

A. I didn't care a rap about that. I expected him to be on our side in the fight they were making against us.

Q. Could the cost of either manufacture or distribution of gas down to a fraction of a cent be ascertained in any other way than from the books of your company ?

A. I don't know ; it might be. I took it that Mr. Lansden was an expert and, as I say, an all-around gasman, and that he would know about what we could do.

Q. You have already told us that items entered into the cost of gas with which he had nothing to do. My present question is whether it was practicable, in your opinion, to ascertain down to within a hundredth part of a cent what the cost of manufacturing gas or the cost of distributing it was.

And thereupon the said witness further testified that he does not suppose the entire cost of the gas to the company could be gotten except from the books, which are in the possession of the book-keeper ; that Mr. Lansden is mistaken when he testified that witness asked him about the cost of gas and Lansden told him that he could not give him that ; that witness could get that in his (witness's) office, and that witness then went out and came back with this data, and he did not do anything of the kind ; that he looked entirely and absolutely to Mr. Lansden for this information ; that he cannot remember to whom he gave the estimates prepared by Mr. Lansden.

And thereupon the said witness, in response to the following interrogatory :

“ Q. You have officers whose business it is to have custody of papers of this kind ? ”

testified as follows :

“ A. I suppose so. I suppose I gave it to Mr. Orme or to Mr. Bailey or any gentleman that I happened to meet. I probably said, ‘ This is a valuable thing ; it is the opinion of Mr. Lansden, an expert opinion, and is a thing that ought to be put away ; it is a good thing for reference. ’ ”

40 And thereupon the said witness, in response to interrogatories, further testified that he knows nothing of the contents of the paper, and doubts if he ever read it himself ; that he did expect him to be the expert of the company and depended upon him ; that he did not ask Lansden what he would swear to ; that he asked him to reduce to writing a defence of the company, that they might have it, and that they could always rely upon, and this he did ; that it was understood that Lansden would naturally represent the company before any committee meeting ; that he expected Lansden to

testify substantially to what was in that paper before the committee; that he has no recollection of having given Lansden such figures, and does not believe that he did; that he did not understand that all Lansden was to do was to testify that these figures were from the books of the company; that he understood that to be simply a statement by Mr. Lansden as an expert; that if he depended only on the books and had relied on them he would have gone to them himself, and could have had that knowledge without Mr. Lansden; that witness asked for his knowledge as an expert; that Mr. Lansden wrote all of the questions, and if there was anything queer in the questions or anything out of the way in the answers it was Mr. Lansden's own fault; that witness knew nothing about it; that his impression was that the figures represented Mr. Lansden's expert knowledge in a general way and not the actual cost.

An thereupon the defendants, to further maintain the issues on their part joined, produced as a witness one CHARLES B. BAILEY, who testified that in 1893 he was the secretary of the Washington Gas Light Company and had held that position for about 26 years; that he resigned the first of December, 1895; that he first saw the letter from Mr. Brown dated February 12th, 1894, soon after it was received; he cannot tell exactly the date; that he thinks he first saw it in Mr. Leetch's possession, and that it was brought to his notice through Mr. Leetch; that he never saw the letter written by Mr. Leetch to Mr. Brown before it was sent and never had any knowledge of its contents; that he first saw it after Mr. Brown wrote to the company saying that he had received a letter from Mr. Lansden in which he questioned the statements contained in the letter; that witness then went to the letter book and looked at it to see what the letter said; that that was the first time he ever saw it; that that was the first time he ever had any knowledge of the existence of that letter; that he never knew anything about the article in the Progressive Age until that article had been published—not until they received a copy of the paper in which the article was published; that he then read it as a mere matter of incident; that he usually looked the paper over; that that was his first knowledge of the article; that it was the general practice of the office that correspondence in matters of this sort shall first go to the secretary; that he first knew of the paper which is in the handwriting of the plaintiff in the early part of 1893; that he

knew Lansden was preparing such a paper, and he called on
41 witness for some figures in relation to the distribution of gas; that witness does not remember what he furnished him, but he furnished him what he asked for; that what he furnished related to the accounts that were kept in the office, especially those accounts relating to the control and distribution of gas—that is, to accounts not relating to the manufacture of and the putting of gas into the holder; that witness furnished him with the footings of those accounts; that he never made any calculations at all, but furnished him with the footings of the account that he asked for;

that witness does not know what Lansden did; that he knew his purpose and had talked the matter over with him; that they were both interested in the same thing—the preparation of this paper—and witness rendered him all the assistance he could and gave him all the information he desired; that he did not give him any percentages as to the cost of gas; that Lansden took these figures that witness had and derived his own results from them; that these footings included the salaries of the officers and all the office expenses, the expenses of the complaint department, and everything relating to the distribution of gas, in which they included everything outside of the manufacture—after the gas is put into the holder; everything outside that we call distribution—that is, getting it to the consumer and getting back money for it; that all accounts that enter into the manufacture of gas are first sent to the works and after that come to the office; that all purchases are made by the engineer at the works of the material entering into the manufacture of gas; that the accounts are sent there and entered on the books, approved there, and sent to the general office for payment, and then they come out in the general books of the company at the Tenth Street office; that the engineer at the works has a record and can tell at any time the cost of putting gas into the holder; that Mr. Lansden applied to witness for this information in respect to the account covering the distribution of gas, which accounts were kept in the main office, and received this information from the witness and made his own calculation.

And thereupon the said witness on cross-examination further testified that the accounts kept at the works are for the purpose of giving the superintendent knowledge of what the gas costs in the holder; that these accounts do not show any money, in a general way; that they are statements that come down showing so many tons of coal and so many gallons of oil, so many bushels of lime, and against these the price is carried out in cents and fractions of a cent; that these monthly accounts show the price of oil; that the oil is contracted for at the main office, but that the clerk at the gas works would know what was paid for it, because he would be informed by the engineer, whose duty it is to know all of these things; that everything that enters into the cost of making gas it is his interest to know and to keep the cost down; that if he can use a half gallon or a fraction of a gallon less of oil in making a thousand feet of gas, it is to his advantage to do so; that their office contains everything, and if any one wants to know the actual
42 cost of the manufactured product they have got to go to their books to learn it; that Mr. Lansden came to witness, and he knows that these figures came from his office; that witness gave Lansden the account that he did not have; that he had partly made up his calculations before he came to witness; that he made up the accounts, so far as the manufacture of gas is concerned, before he came to him and asked him for the accounts he did not have; that the accounts are all classified at the works and entered up on the books there when the bills are received and paid, but witness' office is the only place where the books show the transac-

tions classified for the year; that it would not be an endless job to go over these daily and weekly items and classify them; that he was shown the Brown letter soon after it was received by Mr. Leetch, he thinks, but did not do anything in regard to it; that he was not asked to do anything; that he saw it was a letter calling for a reply, but that he did not answer it; that he did not think it was handed to him as a matter that belonged to him, but it was given him to read, and that he read it; that after Mr. Leetch handed it to him he returned it to Mr. Leetch, for no particular purpose; that the letter was addressed to the Washington Gas Light Company, but the envelope was addressed to Mr. Leetch; that the whole thing was shown to him—letter and envelope; that he did not answer it because it came to Mr. Leetch, and he evidently had not gotten through with it when he handed it to the witness; that the answers prepared by Mr. Lansden had been in his custody, and that the contents of those answers got into the Progressive Age through the letter of Mr. Leetch; that Mr. Leetch got these answers from witness; that he asked to look the paper over; that he never had seen it; that witness told him he had it; that this was at one time when witness and Leetch were talking over the suit that was brought by Lansden; that this was not long after the trouble growing out of this correspondence; that no suit or trouble had arisen when witness first saw this letter of Brown's; that when the question came up witness said to Leetch, "I have a paper in Mr. Lansden's own handwriting where he stated that the price of gas was so and so and the price of distribution was so and so;" that he stated this to Leetch on the subject of this letter of Brown's, and then he gave him this paper; that he did not know what he wanted with the paper; that he thought nothing about it; that Leetch said, "Where is the paper?" that witness got it, and Leetch said, "Let me take it." He took it and went off to his room; that witness never saw it again or heard of it until after this letter was written; that witness did not give Leetch any data to reply to the letter; there was nothing thought about writing the letter at all; that he simply said that as a matter of fact, because he (Lansden) had said that gas could be made and sold at a profit at a dollar; that the correspondence belonged to the secretary's office; that in February, 1894, Mr. Leetch was general manager of the company; that he took the place of what used to be the engineer; that they have now two engineers, one at each end, who are subordinate to Mr. Leetch; that every letter is not written from the secretary's office; that all letters relating to the engineer's department pretty much are written by the engineer or superintendent; that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department; that witness does not think Mr. Leetch would have been the proper officer of the company to give the information which Mr. Brown wanted; that the letter would properly, if it was addressed to the company, have been answered from the secretary's office; that it was not answered from his office because Mr. Leetch answered it himself; that that was a letter referring to the truth or falsity as to the cost of the pro-

duction of gas; that most of the letters relating to the cost of the production of gas would properly come to the secretary's office; that witness saw the article in the *Progressive Age* shortly after it was published; that witness does not know that his company did anything after his attention was called to the article; that witness saw that Mr. Leetch's letter had been used as a basis of a charge that Mr. Lansden had testified falsely, but he took no measure to correct the article in any way; that he did not carry on any of that correspondence; that Mr. Brown came to the office himself personally soon after the article was published, but what explanations were made to him witness does not know.

And thereupon counsel for the plaintiff admitted that the witness Bailey had had no disturbance or controversy with Mr. Lansden and bore no personal malice to him, but added, "Of course, the legal malice implied in this article is a question I cannot dispose of in this way."

And thereupon the witness CHARLES B. BAILEY, having been recalled, testified, on direct examination, that these monthly reports do not show the money that is expended; that they do not show any prices or statements of cost; that they simply show the amount of each kind of material used during the month; that the prices are shown in the yearly report; that the clerk of the works makes a daily report to the daily manager, which shows that these reports have not come directly to the witness for the last two or three years.

And thereupon, on cross-examination, the said witness further testified that the yearly report includes the articles that enter into the manufacture of gas and includes oil; that the clerk gets the price of oil from their office; that the bills for oil go to the works and are there entered; that they go there to be verified and are entered with the prices on them; that they are given to the general manager now, but during the time that Mr. Lansden was there they were sent up from their office; that these monthly reports simply give the quantities of materials used—so many bushels of lime, so many of coal, so many gallons of oil, and so on; that these reports were made up by the clerk of the works, who was clerk to Mr. Lansden, and appointed by the president; that this clerk is the book-keeper; that the report does not show anything that enters into the distribution of gas; that it does not

44 show the taxes; that the amount of taxes paid by the company amount to something over \$40,000; that the taxes for the year 1892-'3 were something over \$40,000; that the amount of taxes did not appear in the books of Mr. Lansden's office; that it was no part of Mr. Lansden's duty to be advised as to the cost of the distribution of gas, and that if Mr. McLean said that it was he was mistaken about that; that the cost of insurance does not enter into the cost of production or manufacture; that it enters into the cost of distribution; that this would not appear upon the books which were at the works and to which Mr. Lansden had access; that this averaged several thousand dollars a year; that the annual cost at that time in street lamps must have been about twenty-odd

thousand dollars; that this did not appear in the books of Mr. Lansden's office, nor did the expense of extending the gas mains and gas pipes throughout the city; that this latter is quite a large item and varies very much in proportion to the number of miles that are laid every year; that it would not be less than \$20,000, probably, in any year of late years; that \$30,000, witness states, would be a small amount; that when he handed Mr. Leetch these answers written by Mr. Lansden at the time he had this Brown letter in charge he knew that the items in those answers, at least in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden's personal knowledge; that they came from their books; that witness gave many of these items to Mr. Lansden; that he did not give him the items that entered into the manufacture of gas; that it was purely a matter of book-keeping to ascertain from the books what the cost of the manufacture was; that witness does not recollect showing to Leetch these answers on the day he was shown the Brown letter, but the dates seem to indicate that it was at that time; that he showed them to him in the first place, and then Leetch said, "I never have seen that; let me look at it;" that he handed it to him, and Leetch took it and went to his room; that he could not say how long he kept it; that witness does not remember when he got it again; that he does not remember when the answers were returned to him; that they have never been out of the city of Washington, to witness' knowledge; that they never were in New York; that they were never sent to Mr. Brown; that it is the recollection of witness that a copy of them was sent to Mr. Brown; that he does not even remember that they did that and does not think they did; that he does not think either the original or a copy was ever sent to Mr. Brown; that the Brown letter came to Mr. Leetch; that it was shown to or read to the witness, but not handed to him, and he did not know it had been answered until he saw it in the *Progressive Age*; that he did not answer it as secretary because it was out of his possession; that if the treasurer of the company should take a letter belonging to his department and keep it, witness would presume that he kept it for some purpose, and would probably wait until he handed it back again; that he would recognize his right to do that, and he would recognize the right of the

45 general manager to take papers that he wanted to see which would come to him as secretary; that he has the right to take such papers, but he does not answer letters that are outside his particular line, as a general thing; that his right to answer any letters addressed to the company has never been officially denied; that if he wants to answer it, witness presumes he would; that witness did not mean to convey the impression that Mr. Lansden could have made up an exact estimate or calculation as to the cost of production from the yearly report; that he does not make up the cost from that report, but he makes up the cost from the books that are kept up at his, Lansden's, office; that he never saw the books at Lansden's office, but witness presumes that *that* they would show the actual cost of production.

Said witness was further interrogated and answered as follows:

Q. And has he also the right to answer letters?

A. That would be a question.

Q. Has it ever been questioned by your company?

A. No; not officially.

Q. He has always exercised the right to answer such letters as he saw fit?

A. He does not answer letters that are outside his particular line, as a general thing.

Q. Has his right to answer any letter to your company ever been denied to him?

A. No.

Q. If he wants to answer it he does it?

A. I presume he would.

Q. That was acquiesced in by your company?

A. It never has been denied.

And thereupon the said witness, on re-examination by counsel for the defendant-, further testified that when Mr. Lansden came to him he gave him all the accounts that he asked for, and that undoubtedly taxes was one of the items; that then Mr. Lansden applied to him for figures going to make up the cost of distribution of gas, and that witness gave them to him; that Mr. Lansden, during his occupancy of the office of superintendent, had the privilege of looking at these items if he wanted to.

And thereupon said witness further testified that Mr. Lansden, in the latter part of his term, had an office on the second floor, over the secretary's office, in the building in which the witness had his office.

Thereupon said witness further testified as follows:

"Q. You say you recollect the incident of being shown the letter from Mr. Brown and about handing Mr. Leetch these questions and answers in Mr. Lansden's handwriting. How do you recollect that incident? How did it happen?

"A. My recollection is that we were talking in regard to the receipt of this letter and its contents, and in the conversation I said that I had Mr. Lansden's figures showing the price to be so much, and then Mr. Leetch expressed a desire to see it. I got it out, and he looked at it and said, I have never seen this; let me take it and read it."

46 And thereupon the defendant-, further to maintain the issues upon their part joined, produced as a witness one WILLIAM B. ORME, who, having been first duly sworn, testified that he is the secretary of the Washington Gas Light Company and has held that position since the 9th of December, 1895; that prior to that time he was assistant secretary, since March, 1885; that he has been with the company since June, 1867; that he has seen the letter of February 12th, 1894, within the last few days, and that he has seen the copy of the original letter from Mr. Leetch, dated February 13, 1894, in their letter book; that he thinks he first saw it

since this suit was instituted; that he could not say whether he saw it at the time it was written; that he cannot say that he saw it at the time it was written; that he does not believe that he saw the letter until after the article had appeared in the *Progressive Age*, whatever date that might be; that that was the first he knew of this affair; that he had no personal knowledge of the sending of that letter at the time that it occurred and really knew nothing about this case until he saw the article in the *Progressive Age*; that he saw the statement made by Mr. Lansden subsequent to his reading the article, but what the date was he cannot say; that he knew nothing at all about this alleged libel or anything connected with it until the publication of the article in the *Progressive Age*; that he is the custodian of the books containing the proceedings of the meetings of the board of directors of the Washington Gas Light Company and has the books containing those proceedings in court; that he has examined this book carefully for each meeting to see whether there is any record of a meeting of the board of directors of that company since the 1st of March, 1894, having any reference whatever to the article which appeared in the *Progressive Age* or the letter written by Mr. Leetch, and that he failed to find any mention of it whatever.

And thereupon counsel for the defendant offered in evidence a letter from the president of the company describing in detail the duties of the engineer; second, a resolution of the board of directors, passed in 1886, for the appointment of the general superintendent, and, thirdly, a certified copy of the appointment of Mr. Lansden.

Said papers were given in evidence, without objection, and are in the words and figures following, to wit:

WASHINGTON, *March 1st*, 1865.

Mr. Geo. A. McIlhenny.

DEAR SIR: You are hereby appointed superintendent of the "Washington" gas works at a salary of \$2,000, two thousand dollars, a year, payable monthly. You will take charge of every portion of said works appertaining to the manufacture, distribution, and consumption of gas and all persons employed in those departments.

All contracts for purchasing coal and selling tar will be made by myself, but you are authorized to contract for other supplies to the works, said contracts to be submitted to me for approval.

47 You will also fix the price of coke, but all coke must be purchased and paid for at the office where the purchaser received an order, which order you will fill and preserve.

You will have stated hours for being at the office in town and give attention to all complaints of leaky mains, etc.

I commend to your special attention the following points:

1st. A fixed standard for gas.

2nd. Increasing the product of gas per lb. of coal.

3rd. Increasing the coke sold.

4th. Saving of refuse coke.

5th. Reduction of men employed at works per 1,000 ft. of gas produced, and all other points which need correction.

The welfare of the company demands economy in its management, and that the gas produced shall be uniformly good.

Respt. yours,

B. H. BARTOL,

Pres't Gas Light Co., Washington, D. C.

A true copy.

Attest: WM. B. ORME, *Sec'y.*

Extract from Minutes of Board of Directors of Washington Gas Light Co.

OFFICE OF THE WASHINGTON GAS LIGHT COMPANY,
WASHINGTON, D. C., *September 17, 1886.*

The board of directors of this company met today at 10 o'clock at the office of the company, Messrs. McIlhenny, Bartol, Riley, and Orme being present.

The minutes of the meeting of July 17 were read and approved.

The president called the attention of the board to the necessity of employing a competent man to fill the position of superintendent of the company (said position being formerly designated engineer), and on motion of Mr. Riley, Mr. McIlhenny was formally authorized to employ such person for the position.

A true copy.

Attest:

WM. B. ORME, *Sec'y.*

SEPT. 25, 1886.

Thos. G. Lansden, Esq.

DEAR SIR: Our board of directors has authorized me to employ a superintendent, and I have concluded to offer you the position at a salary of \$5,000 per annum, payable monthly, the condition being that you will give satisfaction, presuming that you are a first-class gas-works superintendent; otherwise this agreement may be revoked at any time.

You may assume the duties by November 1st or, if more convenient to you, you may name a later date.

Yours very truly,

GEO. A. McILLHENNY, *President.*

A true copy.

Attest: WM. B. ORME, *Sec'y.*

48 And thereupon the said witness, on cross-examination, further testified that the directors of the company in 1894 were John R. McLean, William B. Webb, John G. Bullitt, George T. Dunlop, and James W. Orme; that the secretary of the board was Charles B. Bailey; that his books showed no action by the company either before or after the publication of this article; that he cannot say when he saw this article in the *Progressive Age*—that is, how shortly after its publication; that the paper comes in stated intervals from the post-office, and when he has time he generally glances over it; that he thinks that he has no doubt he saw

this article very shortly after it appeared; that it did not make any impression on him, except that it rather amused him when he saw the article; that he thought it was funny; that possibly he had some talk with some of the officers about it; that he cannot remember talking with Mr. Bailey about it, but has no doubt that he did; that he cannot say that he ever talked with Mr. McLean about it; that he has seen originals or copies of correspondence between his company or its officers and Mr. Brown on this subject, but personally he has not that correspondence, but it is in his possession as secretary, and that his counsel had said correspondence in court.

And thereupon, said correspondence being called for by counsel for plaintiff, counsel for the defendant- said: "Mr. Leetch has those letters and considers them his personal property, and we have sent for them."

And thereupon the defendant-, further to maintain the issues upon their part joined, produced as a witness one GEORGE T. DUNLAP, who, having been first duly sworn, testified that he was director of the Washington Gas Light Company and attended the meetings of the board of directors of that company; that he has been such director since 1893, but is not absolutely certain as to the date; that in February or March, 1894, the board of directors of that company did not take any action in regard to sending any information to the Progressive Age, a paper published in New York in the interest of gas; that witness never heard of it; that no such letter was ever before the board when he was present; that witness never saw the article in the Progressive Age until it was handed to him upon the witness stand; that he never saw a copy of the Progressive Age; that he never had anything personally to do with the publication of that article before or after its publication, and never heard of it until he heard of it in court.

And thereupon, on cross-examination, the said witness testified that some time in the year 1895, he thinks, Mr. McLean told him about this suit and said that the former superintendent had brought suit against the company; that the board of directors never took any notice of that suit; that it was never up before the board and witness never heard of it except in that one instance; that neither the president nor the secretary informed the rest of the board of directors that a paper in their office had been copied by the general manager, as general manager, and sent to New York for publication.

49 And thereupon counsel for the plaintiff called upon counsel for the defendant- to produce all the correspondence between the gas company and any of its officers with either Mr. Brown or the Progressive Age in relation to this matter of Mr. Lansden prior or subsequent to the publication referred to.

And thereupon counsel for the defendant- interposed and objected to producing all papers of that description and to a general notice of that kind to produce all the correspondence on the ground of lack of definiteness in the demand. Said letters referred to were

submitted to counsel for the plaintiff, who thereupon offered the following in evidence; but counsel for the defendant-objected to said letters being offered in evidence, and reserved an exception, on the ground above stated; which exception was then and there duly noted upon the minutes of the court.

Said letters are in the words and figures following, to wit:

"E. C. Brown, publisher.

Established 1883.

Office of Progressive Age. Gas, electricity, water.

NEW YORK, *February 14, 1894.*

John Leetch, Esq., gen'l manager Washington Gas Light Company,
Washington, D. C.

MY DEAR SIR: I thank you for your prompt reply to my letter of the 12th inst. Your statements, as contained therein, are exceedingly interesting, I can assure you. It would seem that the inference as to the occasion for the statement could only result from one cause.

I would ask you, if you can do so without too much trouble to yourself, to give me categorically the questions propounded to Mr. Lansden and answered by him as reported in 'The Star' of the 3rd inst. I should like to reproduce exactly the questions and his replies under the former resolution of Congress, February, 1893, and follow up with the same covering the present investigation.

I will not ask you to hurry about this, for I cannot use the matter until our issue of the 1st of March, but then, I can assure you, I will take it up in the proper way. Any other facts of interest that you can give me in this connection I shall appreciate.

Mr. Lansden is a gentleman whom I have met on only one or two occasions, and I scarcely know the man, but I should have thought that he or any one possessing ordinary judgment would not have placed himself in the awkward situation that he seems to have done, judging from the two records he has made during investigations. I know that the gas industry as a whole will not feel very kindly towards Mr. Lansden from the fact that his statements made at the recent investigation as to the cost of manufacturing and distributing gas are being republished in scores of papers throughout the country, and many gas companies far removed from Washington will have to battle against the recent statements of Mr. Lansden.

Very truly yours,

E. C. BROWN.

50 Will the testimony be printed? If so, I should like to secure a copy of the same."

"E. C. Brown, publisher.

Established 1883.

Office of Progressive Age. Gas, electricity, water.

NEW YORK, *February 19, 1894.*

Mr. John Leetch, gen'l manager Washington Gas Light Co., Washington, D. C.

DEAR SIR: I trust our letter of the 14th inst. in reply to yours of the 13th was duly received. I hope you are intending to give me questions propounded to and answered by Mr. Lansden during the present investigation similar to the manner in which you gave me the questions then answered by him under the former resolution, as appears in your letter of the 13th. I am wanting to treat this matter in the way it should be touched on, and I have in mind publishing Mr. Lansden's testimony on this particular point side by side.

Among all the gasmen whom I have talked with about his peculiar position, not one says a good word for him, as might naturally be expected.

Please let me hear from you as early as convenient, and oblige,
Yours truly, E. C. BROWN."

"WASHINGTON, *Feb. 20, 1894.*

E. C. Brown, Esq., publisher Progressive Age, 280 Broadway, N. Y.

DEAR SIR: I am in receipt of yours of the 14th and 19th instant. This delay in reply was my inability to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee.

Today I received a copy, which I herewith enclose for your use.

Respectfully,
(S'g'd)

JOHN LEETCH,
Gen'l Manager."

And thereupon the defendants, further to maintain the issues upon their part joined, produced as a witness one JOHN LEETCH, who, having been first duly sworn, testified that he is at present the general manager of the Washington Gas Light Company and has had about eleven years' experience in the manufacture of gas; that he was president and general manager of the Georgetown Gas Light Company for nearly eight years and resigned that position about March 1, 1893, to take his present position with the Washington Company; that he does not remember when he first saw the memorandum of questions and answers made by Mr. Lansden, but he thinks he saw that paper prior to the receipt of the letter of February 12th; that he thinks it was immediately after the investigation before Congress, and his recollection is that he was in the office and talking about the testimony that had been given there, and the secretary said that the statement made by Mr. Lansden a year previous conflicted very much with the statement

51 just made before the investigation committee, and said that

he had it in his drawer and brought it out, and that witness asked to see it; that the envelope in which that letter came was addressed "John Leetch, manager Washington Gas Light Company;" that the answer to that letter was written by the witness unaided, without the assistance of anybody; that it was a personal letter, and that he answered it as such; that he has no recollection of showing it to anybody; that it was a matter of indifference to him and the company had nothing to do with it; that he wrote the letter as a personal letter, as a courtesy to the party who wrote for an answer; that he did not write that letter in the performance of his duties as general manager; that he wrote it as a mere act of courtesy to this gentleman who had written to him; that he had no personal knowledge of the gentleman; that he simply wrote the letter to him and witness replied as a mere act of courtesy, outside of his duty as manager of the company in any way; that he received the letters which have been heretofore offered in evidence by Mr. Darlington.

And thereupon counsel for the defendant-offered in evidence the envelopes of letters of February 14 and 19th and March 1st, which are as follows:

"The Progressive Age. Gas, electricity, water.

\$3.00 per year. 280 Broadway, New York. Semi-monthly.

New York, N. Y.,
Feb. 14, 5.30 p. m.,
1894.

JOHN LEETCH, *Gen'l Manager,*
Washington Gas Light Co.,
Washington, D. C.

Personal."

"The Progressive Age. Gas, electricity, water.

\$3.00 per year. 280 Broadway, New York. Semi-monthly.

New York, N. Y.,
Feb. 19, 5.30 p. m.,
1894.

Mr. JOHN LEETCH, *Gen'l Manager,*
Washington Gas Light Co.,
Washington, D. C."

"The Progressive Age. Gas, electricity, water.

\$3.00 per year. 280 Broadway, New York. Semi-monthly.

New York, N. Y.,
Mar. 1, 5.30 p. m.,
1894.

JOHN LEETCH, *Gen'l Manager,*
Washington Gas Light Co.,
Washington, D. C."

And thereupon said witness further testified, on direct examination, that he received letters from Mr. E. C. Brown subsequently to March 1st; that some were received in February; that he thinks he received one on March 23d, and that he replied to that letter.

52 And thereupon counsel for the defendant- offered in evidence said letter of March 23d, 1894, addressed to John Leetch, Esq.; which letter is in the words and figures following, to wit:

"Office of Progressive Age. Gas, electricity, water.

NEW YORK, *March 23rd, 1894.*

John Leetch, Esq., gen'l manager, Washington, D. C.

MY DEAR SIR: Of course you have read our article concerning Mr. Lansden's conduct (our issue 1st). Will you please inform me at your early convenience if our wording of questions and answers as furnished by you in our letters to me dated 2, 13, are correct? Can you, without too much trouble to yourself, supply me with a copy of the testimony taken under the 1893 resolution?

Lansden is mad at what we have published, and I think he means *fight*. The Age will not change its position in the matter unless it can be clearly established that it has done the man an injustice, and I fail to see, in view of the testimony, how he can show that. Please let me hear from you.

Yours, etc.

E. C. BROWN."

And thereupon the said Leetch identified a press copy of an original letter dated March 24, 1894, addressed to E. C. Brown, Esq., and said copy was offered in evidence by counsel for the defendant- and is in the words and figures following, to wit:

"WASHINGTON, *March 24, 1894.*

E. C. Brown, Esq., publisher Progressive Age.

DEAR SIR: Yours of the 23d instant is received. I have read the article in the Progressive Age on the question of cheap gas; also the statement as to Mr. Lansden's testimony in 1893 and his recent testimony before the investigating committee, a copy of which was sent you. The answers to questions in 1893 were written out by Mr. Lansden in anticipation of being called upon to go before the committee of Congress, before whom there was a bill to reduce the price of gas in the public parks and the Executive Mansion.

This bill was not prepared, neither was Mr. Lansden called before the committee.

The answers to questions as published by you are correct and are in his own handwriting in this office.

Very truly yours,

JOHN LEETCH,

Gen'l Manager,

By WHITWELL."

And thereupon said witness further testified, on direct examination, that none of the letters which have been read in evidence were written by him in his capacity as general manager of the Washington Gas Light Company; that it was a mere personal matter altogether, exclusive of any duty that he owed to the gas company; that the gas company had no interest in it, and he merely wrote it as an act of courtesy, stating the facts;

that he has no recollection whether any of the other officers of the company were acquainted with those letters and his answers to them; that nobody knew anything about it; that he does not know that he ever showed them to anybody; that in February, 1894, he had no malice towards Mr. Lansden and never had.

And thereupon said witness, on cross-examination, further testified that he thinks he saw a letter of March 1st purporting to have been written by E. C. Brown, but did — answer it; that there were several letters that he did not pay any attention to, but threw aside, as he had no interest in them; that he also supposes he received a letter of March 21st.

Said letter of March 1st is as follows:

"John Leetch, gen'l manager Washington Gas Light Company,
Washington, D. C.

DEAR SIR: I am sending you by this day's mail ten (10) copies of our issue of this date. On page 79 you will find an editorial relating to Mr. Lansden's exploit. I have thought we have not been as severe in handling him as his conduct calls for. What do you think about it?

Very truly yours,

E. C. BROWN."

And thereupon the said witness further testified, on cross-examination, that he did not answer that letter; that he has no recollection of it; that he got the copies of the paper therein referred to, and thinks they came to him; that he does not know that the article of March 1st was largely written upon the data which he had furnished; that it was not done upon his authority; that he did not know anything about the editor nor what he did; that it seems to be a copy of the letter that witness originally sent and Mr. Lansden's statement in his own handwriting; that that was a copy of Mr. Lansden's statement as to the price of gas, sent to Mr. Brown in answer to his letter of February 12th; that he does not know, as a matter of fact, that Mr. Lansden had not testified in 1893; that he found the statement at the office, and did not know anything about that when he wrote the letter; that what he sent him was a copy in Mr. Lansden's handwriting; that he made no answer to the inquiry as to whether or not he (witness) thought the article was too severe, because he had nothing to do with it, and took it for granted that Mr. Lansden's statement, as copied, was an honest, conscientious statement of the price of gas; that he believed it then and believes it now; that he did not know that he had not testified before a committee in 1893; that when he wrote the letter to Mr. Brown as to the matter being before a committee he did not say he (Lansden) appeared before a committee, but that he was called upon to make these answers; that in a later letter he wrote that Mr. Lansden was not called upon to go before the committee, but that this was not until after Mr. Brown had written to him that Lansden was going to make a fight; that he did not answer the letter of March 1st at all; that he was not connected with the gas company when Mr. Lansden wrote out these answers

in 1893; that when Mr. Lansden went before the committee and made his statement in 1894, witness was also before the same committee; that Mr. Lansden's testimony was strange; witness thought he was making statements as to the prices of gas not borne out then by the fact, and his recollection now is that the next day, perhaps, in talking with the officers there—does not know who they were—Mr. Bailey, who was then secretary, said, "Mr. Lansden's testimony now differs very materially from his own written statement or his testimony"—I do not recollect the words—"a year ago;" "I have it in my drawer;" that Mr. Bailey produced it and the witness took it; that he asked to take it to look at it at his office; that his office was upstairs, he believes the same office occupied by Mr. Lansden prior to his taking charge; that that was the way he came into possession of it; that he knew nothing of it at the time more than the mere fact of its being in Mr. Lansden's own handwriting, an honest statement of facts, as he considered it then; that he wrote Mr. Brown the letter he did and copied the statement of Mr. Lansden; that he had been there for several months—probably two months—with Mr. Lansden, and saw his handwriting often; that the officers of the company recognized it, and, of course, he took it for granted that if they said so it was all right; that he has no recollection that he showed Mr. Bailey this Brown letter on the morning that it came in; that sometimes where the letters have any bearing upon their duties—some inquiry about some matter that may refer to the gas business in general—he would talk with them and show them the letter; that he and Bailey talked together in that way; that he regarded this letter of Mr. Brown's of February 12th as a personal letter to him—a personal inquiry of him; that he could not say that he ever saw Brown before February 12th, 1895; that some personal letters came to him addressed as gen'l manager of the Washington Gas Light Company for the reason that there is another gentleman John Leetch in Washington and to whom his letters would go astray; that this is simply a post-office designation, so that people will know that they are to write to John Leetch at the gas office; that many of his personal letters come addressed to the Washington Gas Light Company; that personal friends write him letters and address them to the Washington Gas Light Company; that he never noticed until less than a week ago that this letter was addressed to the Washington Gas Light Company; that after he was subpoenaed he got the letters out and then saw that the envelope was his, and that the inside he never noticed specially until within a week; that he just looked at the body of the letter; that he takes it for granted that if the address of E. C. Brown was not upon his own letter that he got it from the periodical they received at the office; that the whole tenor of the letter is to him; that he had just been before the committee and had met Brown, he thinks, once before; that he could not say that any part of the letter could be selected as personal; that 55 in letters that are written to him personally he is not generally designated as "Gentleman;" that he regarded it as a personal letter from the fact that the inquiry itself related to facts

that had just transpired ; that he received the letter and considered it a personal one and answered it as an act of courtesy, without reference to his position with the Washington Gas Light Company.

And thereupon the following took place :

Q. Were they matters which concerned you personally ?

A. Partially ; not altogether ; no, sir. I was speaking of the testimony that had just been given, to which the letter referred.

Q. We are talking about the letter.

A. I cannot take up the letter and say what was in the man's mind when he wrote it. I received it and considered it a personal letter bearing simply a personal inquiry. I answered the letter as an act of courtesy, without any reference on earth to my position with the Washington Gas Light Company.

Q. Do you think that long answer answers my question ? What is there in this letter which you consider personal to yourself ?

A. I don't know, sir ; it was an inquiry of me.

Q. Here is the letter. Take it and read what is personal to yourself.

A. I cannot explain the letter in that way. It was directed to me, and I considered it a personal matter and an inquiry for certain facts.

That he had been before the committee himself, and his statement was the very reverse of Mr. Lansden's statement, and in that sense it became personal ; that there is nothing in the letter which asked him whether his statements were the reverse of Lansden's, nor is there any reference at all to his testimony ; that he thinks the latter part of that letter is personal ; that it is asking him to give his opinion as to what the papers had published in Washington ; that the letter was directed to him, and that he never opened a letter directed to the Washington Gas Light Company ; that he looked at the body of the letter and did not notice the words " The Washington Gas Light Company " until within a week or so ; that since he answered the letter it has been amongst the other papers in the secretary's office or in the office of the young man who had charge of these letters and papers ; that this letter was picked out of his office ; that it did not remain in his office after there was an indication that trouble would follow ; that he thinks Mr. Brown came on and said that Mr. Lansden was making some trouble with him about the publication, and in view of that witness kept the letters to see what he had really written, and the letters were passed over and given into the care of Mr. Bailey ; that the letter was given to the care and custody of the secretary of the gas-light company because it was a matter that had assumed a position when it was necessary to save the letters ; that Mr. Lansden was charging that the statements made were false ; that they were mere copies of the witness' own letters and his replies to Mr. Brown, and he wanted to save them ; that nobody prompted him in the writing

56 of the letter of February 13th ; that he could not have written this letter of February 13th without these papers that the Washington Gas Light Company gave him or without having seen

those papers; that he was aided to the extent that he was shown by the secretary Mr. Lansden's own statement; that he answered the letter personally and not as general manager; that he signed it as a kind of a post-office address because his letters were being mixed up with John Leetch's or some one else; that he did not know and had no reason to know, until it came out, that Mr. Brown was getting up this data to publish in his article; that the first he knew anything of it was when he saw it in this magazine; that he did not know anything about it before that time; that was the first publication; that it is his recollection that the first they saw of it was in this journal; that he knew, when he wrote the subsequent letter of February 20, 1894, that Brown was going to publish Mr. Lansden's statement; that he knew that, for Brown stated it in his letters; that he got this letter of February 14 from him in the course of the mail and in an envelope which is dated Washington, February 15th, and it is marked a personal letter; that he has no idea whether the direction "John Leetch, Esq., general manager," was put on the inside of that letter to keep the other John Leetch from getting it; that he does not know what was in Brown's mind; that he did not think he was addressed on the inside as general manager of the Washington Gas Light Company for the purpose of keeping the other John Leetch from getting it; that in the light of that letter he took it for granted that Brown was going to publish the letter he had sent him of February 14th; that he had every reason to believe that he was going to publish it; that he did not know just when the journal came out; that the article was published March 1st, and that this letter was dated February 14th, two weeks before that; that he knew he was going to publish it in the issue of March; that he had noticed a part of the letter, which reads, "I know the gas industry as a whole will not feel very kindly towards Mr. Lansden from the fact that his statement-made at the recent investigation as to the cost of manufacturing and distributing gas are being republished in scores of papers throughout the country, and many gas companies, far removed from Washington, will have to battle against the recent statement of Mr. Lansden;" that he does not know that he understood that this publication was intended to embitter the gas interests against Lansden; that he never furnished Mr. Brown with any data other than Mr. Lansden's own statement that was furnished in answer to the letter of February 12th; that he believes Mr. Lansden's statement-in the answers and questions to Mr. McLean were the honest convictions of Mr. Lansden at the time as to the price of gas, and had no reason to doubt it then and has none now; that he said in the letter of February 13th, "As Mr. Lansden is no longer in the employment of the gas company, the motive was generally understood which prompted his statement," because Lansden volunteered to make a statement 18½ cents different from what he had just written out; that he does not know anything about Mr. Lansden's motive, and the only reason he said anything about his motive in 1893 was because he had heard several parties say that Mr. Lansden had said he was

going to get the company on the Hill, and witness took it for granted that he was there voluntarily for that purpose.

A copy of the report of said investigating committee was produced at the bar of the court, upon the face of which it appeared that said report was made to the House of Representatives on the 23rd day of March, 1894. Said report was not formally offered in evidence, but it was referred to by both parties in the cross-examination of witnesses and in argument before the jury without objection, and its date was specifically referred to in argument by counsel for plaintiff, also without objection.

Counsel for the defendants objected to this being incorporated in the bill of exceptions because said report had not been offered in evidence.

And thereupon, on redirect examination, said witness further testified that he appeared before the same committee in 1894 that Mr. Lansden did; that his testimony was also reported in the newspapers, practically; that they did not always report in full; that he supposed his name appeared in the newspapers as general manager of the Washington Gas Light Company and as having appeared before that committee.

And thereupon, on cross-examination, the said witness further testified that it is true that there was no investigation committee in 1893; that in the letter of February 13th, where witness said that under a former resolution of Congress, bearing date February 13, 1893, Mr. Lansden was called, he meant just what he said—that there was a resolution before Congress to reduce the price of gas to 75 cents; that it was probably in an appropriation bill, as is often done.

And thereupon the defendant, further to maintain the issues upon *its* part joined, produced as a witness one JAMES W. ORME, who testified that he was a director in the Washington Gas Light Company and had been for ten or twelve years; that he was a director in 1894; that he does not know and never heard of any discussion in the board of directors in February, March, or April of that year, or of any order being passed by the board of directors authorizing Mr. Leetch to answer a letter written by Mr. Brown, the editor of the *Progressive Age*, of New York city; that he attended all the meetings, he believed, monthly and never heard of any act of the board of directors which ratified the writing of a letter by Mr. Leetch to the editor of the *Progressive Age*, in New York city, of the date of February 12th.

And thereupon counsel for the plaintiff admitted that Mr. William B. Webb would testify substantially as Mr. Orme had done.

And thereupon counsel for the plaintiff stated that they would concede that persons are sometimes allowed to make statements before committees without being sworn, and that investigating committees sometimes interrogate persons without swearing them.

58 And thereupon the defendants, further to maintain the issues upon their part joined, produced as a witness one WILLIAM H. C. BAILEY, who, having been first duly sworn, testified that he is a clerk or book-keeper for the Washington Gas Light Company at the west station, corner 26th and G streets, and has been in their employ for 29 or 30 years at that station; that he was there all the time Mr. Lansden was superintendent of that station; that he never made any reports to the central office. When he first went with the company Mr. Bartol lived in Philadelphia; that he was president of the company and Mr. McIlhenny was superintendent. The witness then made monthly statements.

And thereupon said witness further testified that an accurate estimate of the cost of the manufacture of gas could have been made in the holder from those reports, knowing the cost of the material; that the papers were submitted first to Mr. McIlhenny, then to Mr. Lansden, and then to Mr. Leetch; that it is the daily report they looked at, and at the end of the month witness made up a statement from the daily reports.

And thereupon said witness further testified, on cross-examination, that these papers were not preserved; that he kept a record of all materials used and the cost of the oil that is consumed there; that sometimes he saw the oil bills and sometimes he did not; that these statements are a mere matter of record, to show whether there was a falling off or improvement in the business of the company, and that they are not preserved, that he was aware of; that he does not know what became of them after they left witness' office or whether they are preserved in the company's office or not.

And thereupon the plaintiff, THOMAS G. LANSDEN, was recalled for further cross-examination and testified that he resigned from the gas company on the 1st of June, 1893; that in the summer of 1893 he did not go to Baltimore to attend a dinner or a party given to the visiting engineers; that he was in Maine at that time with his sick wife; that he continued his visits to the office of the gas company to get his mail clear up to the time of this publication; that sometimes mail would come to him; that some people did not know that he had left the works and some of the mail still came there; that he did not go to Baltimore within three weeks after his resignation from the gas company; that he passed through Baltimore on his way to New York with his wife; that he does not recollect going to Baltimore within three or four weeks; that he had some business there with a concern—Bartlett, Hayward & Co., gas constructors—and may have gone there; that within three or four weeks after his resignation as superintendent of the gas company he did not come down into the complaint-room, where Mr. Holden, Mr. Eutwistle, Mr. Falls, Mr. Hart, and Mr. Cash were present, and did not say to them that "he was going to make it hot for the gas company this winter up on the Hill;" that he left here immediately—within ten days or two weeks after his resignation—and took his wife up to Maine; that he never said

59 "the gas company has got the best of him now, but that he was going to meet them on the Hill in the winter;" that he never thought of such a thing; that he went to the office to clear up that publication; that he does not recollect of ever talking to Mr. Hart about meeting him "up on the Hill;" that he was not in the habit of making such threats with the clerks; that he was not here that summer; that he was away until along in September, and then went to Chicago; that he was here a few days after his resignation; that he then went up into Maine in June and staid there until some time in September; that he then came back with his wife and immediately went to Chicago with her and returned here some time in November or December of that year; that he does not remember exactly the date he went away; it was eight or ten days after he resigned; that he remained here fixing up his business for about eight or ten days; that he was a witness in the case of Eckloff against the gas company; that he does not remember that he was under subpoenae in the case of Eckloff against the gas company and remained here through the month of June; that he knows he left here in June, but does not remember what date; that he remained here for that case to come up at the request of the gas company, but was never subpoenaed; that he may have been subpoenaed, but does not recollect. He remained here because he was in that case; he was one of the victims of the explosion.

And thereupon the defendant, further to maintain the issues upon their part joined, produced as a witness one THOMAS F. HOLDEN, who testified that about two weeks after the resignation of Mr. Lansden—one afternoon after Mr. Lansden returned from Baltimore—witness came downstairs on his way home and went into the complaint department, where Mr. Falls, Mr. Entwistle, and Mr. Hart were present; that during the conversation that ensued Mr. Lansden said that he had been working for the gas company, but that he was now working for the consumers, and he said that he would "meet them up on the Hill;" that that was all he said in regard to the company. He said about himself that he had been offered a position by Bartlett and Hayward to superintend the construction of some works at a salary of \$2,500 a year, but he had told them he had not had a holiday for thirty years and he wasn't anxious to take a job that wouldn't pay him more than that after working for \$5,000 a year so long.

And thereupon the said witness, on cross-examination, testified that this conversation was two or three weeks after Mr. Lansden's resignation, in the year 1894; that he fixes that date because it was around the inauguration of President Cleveland; that it was the June following Mr. Cleveland's inauguration; that witness does not know what Lansden had been to Baltimore about; that he did not tell witness it was in connection with these visiting engineers; that at that time witness' position with the company was mechanical draftsman; that he did not mention the conversation which occurred at that time to anybody; there were others present; that he

60 did not mention this conversation until two or three weeks ago, when he was asked if he had ever heard Mr. Lansden make any threats against the company.

And thereupon the defendants, further to maintain the issues on their part joined, produced as a witness one R. W. FALLS, who testified that he is a clerk in the employ of the gas company, and his office is in the main building; that he knows the plaintiff, Mr. Lansden, very well; that he remembers the time of his resignation from the gas company; that shortly after the resignation of Mr. Lansden—some time in June—in the presence of Mr. Entwistle, Mr. Holden, the two Harts, Mr. Lansden said that he had been working for the gas company for the last thirty years, and now he was going to work for the consumers, and he would meet them on Hill next winter; that he also said something about having the price of gas reduced; that he said he would bring the gas down to one dollar.

And thereupon the said witness, on cross-examination, further testified that he was in charge of the complaint department, in the basement; that he has mentioned this conversation several times, but the first time that he remembers mentioning it to anybody was in the past two or three weeks; that he thinks he spoke to several persons about it, but cannot state when or where it was; that he told Mr. Webb about it when he was sent for to ascertain if he recollected what Lansden had said upon that occasion; that Lansden was a friend of theirs and he did not think it necessary to say anything about it; that he took no regular steps to inform his superior officers of what Lansden had said; that on that occasion Lansden also said that he had just come from Baltimore, where he had met a party of gentlemen who had had a good time; that he did not tell witness that these men were gas engineers.

And thereupon the defendant, further to maintain the issues upon their part joined, produced as a witness one ISAAC H. ENTWISTLE, who, having been duly sworn, testified that in the year 1893 he was the night clerk at the complaint office; that about a week or ten days after the resignation of Mr. Lansden, in June, 1893, in the presence of Mr. Falls, Mr. Holden, the two Harts—William F. and William—he heard Mr. Lansden say that he was going to meet the company up on the Hill next winter; that they were having a general conversation about having the price of gas reduced and the investigation in Congress; that Mr. Lansden came in and said that heretofore he had been working for the gas company, but now he was going to work in the interest of the consumer, and that he would meet the company up on the Hill next winter.

And thereupon the said witness, on cross-examination, further testified that the two Harts to whom he referred were employed by the gas company; that one was the clerk in the distribution office and the other was general inspector; that the distribution office is across the hall, on the same floor with the complaint office; that this conversation took place late in the afternoon; that witness had just

61 come on duty, and he was supposed to be there at four o'clock ; that Mr. Lansden also said that he had been to Baltimore to see Bartlett & Hayward ; that he had had a good time there and had been drinking champagne ; that this was the general conversation about the matter that was coming up before Congress ; that they had offered a resolution, as witness believed, but does not know just what it was ; that he does not know that any investigation had taken place in the summer of 1893. He thinks the resolution was offered in 1893, but there wasn't any investigation ; that the date 1893 had been fixed in his mind because he was only night clerk from the first of April, 1893, he thinks, to the first of November, 1893 ; that then he took Mr. Falls' place ; that he is positive it was during the time that he was night clerk this conversation took place ; that he was sitting at the time behind the rail in witness' office, and after that he thinks he was never behind the rail ; that Lansden came in the office several times, but he was always out in front of the rail ; that this conversation was a very short time after he severed his connection with the company ; that after he had heard Lansden make this threat against the company he did not do anything about it ; that he did not think it was his duty to do anything ; that he spoke to Mr. Poor, the treasurer of the company, just a short time before the trial, because he asked witness if he had heard any threats ; that that was the first he knew about it.

And thereupon the defendant, further to maintain the issues upon *its* part joined, produced as a witness one WILLIAM HART, who testified that he is clerk for the superintendent of the gas company, and that that was his occupation in 1893 ; that in June, he thinks, 1893, he heard Mr. Lansden say that "he would meet the company up on the Hill this winter ;" that that was all he heard him say ; that there were present on that occasion Mr. Falls, Mr. Entwistle, and Mr. Hart, a cousin of the witness.

And thereupon, on cross-examination, the said witness further testified that he was clerk to the superintendent of distribution, Mr. Wilson, and not clerk to the superintendent of the works ; that he is not certain this conversation occurred in June ; that it was shortly after Mr. Lansden resigned ; that the year is fixed in his mind because that was the year Mr. Leetch took charge as general manager ; that Mr. Leetch was not present during this conversation ; that the conversation might have taken place in 1894 if Mr. Lansden was there ; that he heard Mr. Lansden say nothing about having *being* to Baltimore on that occasion ; that he did not report this conversation to anybody, but was asked about it by Mr. Poor, the treasurer of the company.

And thereupon the defendants, further to maintain the issues on their part, produced as a witness one WILLIAM F. HART, who, being first duly sworn, testified that he is an inspector of the Washington Gas Light Company and was such inspector in 1893 ; that in May,

1893, Mr. Lansden went to Chicago to attend the Washington Gas Association meeting, and on his return, or a few days after his return, tendered his resignation to the Washington Gas Light Company; that about a week after that, upon his return from Baltimore, one afternoon, in the basement of the office—in the complaint office—he, witness, heard Mr. Lansden remark that he would meet them on the Hill, or that he would see them on the Hill.

And thereupon, on cross-examination, in response to interrogatories propounded by counsel for the plaintiff, the witness testified that he did not report the matter to any one, but had forgotten all about it until Mr. Poor, the treasurer of the company, asked him about it two or three weeks ago; that he cannot fix the time when he asked him, but it was possibly two weeks ago—in the month of February; that he was not in the room during the entire conversation; that Mr. Falls and Mr. Holden and several others were present.

And thereupon the witness JOHN LEETCH was recalled, and, in response to further interrogatories, on cross-examination, propounded by counsel for the plaintiff, testified that he made copies of the several letters which he wrote to Mr. Brown in February and March of 1893 in the book at the office, in which he has the privilege of making copies for the general office work.

The witness thereupon identified the book in which the copies were made; that he (witness) does not know of any letters or personal or individual matters in this book prior to March 1st, 1894, or that do not relate to affairs of the gas company, except those of the same nature as those of the letters hereinbefore referred to.

And thereupon counsel for the defendants announced their testimony closed.

And thereupon the plaintiff, further to maintain the issues on his part joined, called in rebuttal the witness THOMAS G. LANSDEN, who testified that he was 62 years and 2 months of age; that he recollected a dinner that was given in Baltimore by the American Meter Company, inviting the association from Washington over there to dinner and to look through their new battery; that he attended only one such meeting in 1889 and one since that time, in 1894; that Bartlett and Hayward never offered him a position, and that he never said they did; that he, witness, went to them and asked them if they knew of any open position, and they recommended him to a position in New York as engineer in a large New York works; that at the time these questions and answers were written he had no office in the main building of the gas works, and that this memorandum was made up for Mr. McLeans at his office at the gas works, at the foot of G street; that no man can make up the record of the cost of gas from the engineer's book, because the records are not there; that the matter of the ascertainment of the exact cost of gas, as given in the questions and answers, is a

mere matter of book-keeping in the office, where there is a classification of accounts; that he, witness, never had any connection with the books of that office and never examined them, and that it was no part of his duty to do so; that Mr. Bailey, he thinks, gave the figures by order of Mr. McLean; that he never looked over the books and never saw the books at any time during his entire connection with the company; that the most expensive item in the manufacture of gas would be oil in water gas and coal in coal gas; that he, witness, did not buy the oil; that he was not informed by the company as to the cost of oil, but it was purposely kept from him; that once a bill was sent to his office in which the man by mistake in putting down the number of gallons had put down the price; that he would know the cost of little expenses about the works, such as packing and oil for running the engine or pipe fittings, but would not know what it would be in a year; that he would certify such bills at the end of the month and they would be returned to the main office; that he, witness, never was furnished with a copy of the letter of March 1st by Mr. Bartol, the president, defining the duties of the superintendent; that he never saw it before and was never informed that his duties were defined by that letter; that he did not buy all the material except coal, as stated in said letter.

And thereupon, on cross-examination and in response to interrogatories propounded by the counsel for the defendants, said witness testified that he does not recollect that he was ever in the office of the gas company after the publication of the article in the Progressive Age, although he may have dropped in downstairs to ask if there was any mail; that he does not recollect that he was furnished with figures by Mr. Bailey for the purpose of getting up this paper; that if they had been figures made of his own knowledge they never would have gotten out of his mind; that Mr. Bailey never gave him the items of the cost of the various things that entered into the price of gas or the percentage, but the total cost; that the figures were given to him just as they appear in the paper, as 48.39 in the holder and 40.09 cents for distribution; that these were all the figures he ever got from Mr. Bailey, and that he, witness, does not know who worked out the percentages; that during the time he was connected with the Washington Gas Light Company he did not have the books and could not have worked out the percentages without them; that he never did work out the percentages; that in St. Louis he was an engineer and superintendent, and that he had more power in St. Louis than he had in Washington; that in St. Louis the book-keeper worked out the percentages, and that he never did work them out with his own hand; that annual reports were made out in the company when he was in St. Louis, and the percentage of cost in the holder and at the burner appeared in the annual report; that he did not make up the percentages, but they were made up under his supervision; that the cost per thousand feet was made up once a year for the annual report; that although he was here for seven years he did not make up the percentage of the cost of manufacture and dis-

tribution because he did not have the books; that when he went before the investigating committee of Congress in 1894 he was testifying in regard to the cost of making gas and the cost of distributing gas per thousand feet upon his general experience as a gas engineer of 30 years' standing; that he did not take into consideration his experience in Washington in making up the question as to the actual cost, because the books of the company showed very differently from his idea; that he, witness, made up his estimate for his testimony before the committee as to the cost in this city upon his general knowledge of the gas industry all over the country, and from his knowledge as an expert; that he did not testify to positive facts, but he said that gas could be put in the holder at from 30 to 32 cents; that such was his opinion as an expert, based upon his experience here and elsewhere; that he appeared before the committee as a citizen of Washington, invited to go before the committee; that he was asked if he had had any connection with the Washington Gas Light Company; that he did specify at what price, in his opinion, gas could be made, but that he did not know the actual cost.

And thereupon, on redirect examination and in response to interrogatories propounded by counsel for the plaintiff, said witness testified that from his experience as a gas engineer he knew what gas ought to cost, and from his monthly report he knew what it did cost to put it in the holder from month to month.

And thereupon counsel for the defendant admitted that about 90 per cent. of the letters in the book produced kept by Mr. Leetch at the office of the gas company, in which appeared its letter-press copy of the letters of Leetch to Brown of Feb'y 13, 1894, Feb'y 20, 1894, and of March 24, 1894, were in the handwriting of Mr. Bailey, and signed by him as secretary, and that all of the letters in said book were signed officially, either by Bailey as secretary or Orme as assistant secretary, or Leetch general manager.

And thereupon counsel for the plaintiff announced his testimony closed.

The foregoing was all the evidence in the case in behalf of either the plaintiff or the defendants.

And thereupon, upon all the evidence hereinbefore set forth, the defendants, by their counsel, moved the court to instruct the jury to return a verdict for the defendants, but the court overruled the said motion, and counsel for the defendants noted an exception to the said ruling of the court.

And thereupon the plaintiff, by his counsel, prayed the court to instruct the jury as follows:

1. If the jury believe from the evidence that the letter dated February 13, 1894, referred to in the deposition of E. C. Brown and purporting to be signed by the defendant John Leetch, was in fact written by said defendant and by him forwarded or sent to said Brown, and that at the time of so writing and sending the said Leetch was the general manager of the defendant The Washington Gas Light Company, and that he so wrote and sent the said letter

in the course of his duties as such general manager of said company; and if they further find from the evidence that at the time of such writing and sending the said Brown was and
65 was known to the said Leetch to be the publisher of a newspaper or periodical called "The Progressive Age," and that said paper then was and was known to the said Leetch to be devoted to the interests of and to have an extensive circulation among gas producers and manufacturers throughout the country, then it is a question for the jury to determine, from all the facts and circumstances in the case as disclosed by the testimony, whether the said letter was or was not so written and sent for the purpose of supplying the data which it contains for a publication in said Progressive Age, or with the knowledge that it was likely to be or probably would be used for such purpose; and if the jury believe from the evidence that it was so written and sent maliciously for such purpose or with such knowledge, and that the article complained of in the plaintiff's declaration was in fact published and circulated in said Progressive Age, then, to the extent that the contents of said article were suggested and inspired by said letter, if the jury shall believe from the evidence that such contents were so suggested and inspired, the defendants The Washington Gas Light Company and Leetch are legally responsible for the publishing of said article; and if the jury believe from the evidence that said article falsely and maliciously charges the plaintiff with having testified contradictorily and falsely before any committee of Congress, from improper motives and in violation of his duty to the Washington Gas Light Company, his former employer, and that such charges were fairly and naturally suggested and inspired by said letter, then the plaintiff is entitled to a verdict against the defendants The Washington Gas Light Company and Leetch in this action.

2. If the jury shall find from the evidence each and every of the several questions of fact set forth and submitted to them in the foregoing first instruction in favor of the plaintiff, and if they shall further believe from the evidence that the figures as to the cost of the manufacture and distribution of gas set forth in the paper which has been referred to as the answers of Lansden in 1893, as they appear in said answers, were furnished Mr. Lansden from the books of the company for the purpose of being inserted in said paper and were not figures produced or arrived at by him personally, as to the cost of either such manufacture or distribution; and if they further believe from the evidence that the defendant Charles B. Bailey well knew that said figures were so furnished said Lansden from the company's books, and that they did not represent said Lansden's own estimate or knowledge of the cost of either the manufacture or the distribution of gas, but that the said defendant, Bailey, nevertheless, on being shown by Mr. Leetch the letter of E. C. Brown of February 12, asking information in reference to the testimony given by Mr. Lansden in 1894, called the attention of said Leetch to the said so-called Lansden answers of 1893, and gave them to him for the purpose of enabling him to communicate them

to said Brown as Lansden's own statement in regard to the actual cost of such manufacture and distribution, and as tending to impeach his sworn testimony before the committee of Congress in 1894, and maliciously intended that the same should be communicated to said Brown for the purpose aforesaid, then the jury would be justified in finding for the plaintiff against the defendant Bailey as well as against the defendants Leetch and the Washington Gas Light Company.

And thereupon the court, of its own motion, added the following to said instructions:

It will be observed that the two foregoing instructions require the jury to find that the said Leetch acted maliciously in order to justify the jury in finding against him and the Washington Gas Light Company, and that the said Bailey acted maliciously in order to justify a verdict against him. But if you believe from the evidence that they communicated any false and libelous matter about the plaintiff to said Brown, knowing it to be false, with the intent or consent, express or implied, that the same should be published, you will be justified in finding malice therefrom, unless you shall believe from the whole evidence that no malice existed. The meaning of malice as here used is not confined to its ordinary meaning of hatred or ill will, but means also an intention to injure the plaintiff or a reckless disregard of his rights and of the consequences which might result to him from the false publication.

3. If, under the testimony and the instructions of the court, your verdict shall be for the plaintiff as against any of the defendants, then it is your duty to award the plaintiff as against such defendants such damages as you believe from the evidence shall fully compensate him for the injuries, if any, suffered by him from the conduct of said defendants complained of in the declaration and which you shall find sustained by the proofs, in estimating which damages you may consider the language used in the publication complained of, in so far as you shall find from the evidence that said language was inspired by said defendants, the nature of the charges and imputations conveyed by said language, the vehicle used in giving publicity to the same, and the mental suffering, if any, which you find from the evidence has thereby been occasioned to the plaintiff.

And thereupon the court granted the foregoing separate and several instructions on behalf of the plaintiff; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

1. The jury is instructed to find a verdict for the defendants.
2. The jury is instructed to find a verdict in favor of the defendant The Washington Gas-light Company.
3. The jury is instructed to find a verdict for the defendant John R. McLean, who is president of the said Washington Gas-light Company.
4. The jury is instructed to find a verdict for the defendant

Charles B. Bailey, who is or was secretary of said Washington Gas-light Company.

5. The jury is instructed to find a verdict for the defendant William B. Orme, who is or was the assistant secretary of said Washington Gas-light Company.

67 6. The jury is instructed to find a verdict for the defendant John Leetch, who is the general superintendent of the said Washington Gas-light Company.

But the court refused to grant any of the said instructions to the jury; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted to the ruling of the court to grant each of the said several instructions.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

7. If the jury shall find from the evidence that the defendants did not request or solicit the publication of any article in the *Progressive Age* of or concerning the plaintiff, and that the article set forth in the plaintiff's declaration was published without their knowledge, then their verdict should be for the defendants.

But the court refused to grant said instruction as prayed, but granted the same in a modified form, as follows:

7. If the jury shall find from the evidence that the defendants did not request, solicit, *intend*, or *inspire* the publication of any article in the *Progressive Age* of or concerning the plaintiff, and that the article set forth in the plaintiff's declaration was published without their knowledge or *procurement, directly or indirectly*, then their verdict should be for the defendants and for each defendant not so participating in the publication thereof.

To which ruling of the court in refusing to grant said instruction as prayed and in granting the same as modified by the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

8. If the jury shall find from the evidence that the article entitled "The acrobatic performances of Lansden," as published in the issue of "The *Progressive Age*" of March, 1894, was not composed and published or procured to be composed and published by the defendants as an entirety, as charged by the defendant in this cause, then their verdict should be for the defendants.

But the court refused so to instruct the jury; to which ruling of the court the defendants, by their counsel, then and there excepted.

And thereupon the said defendants, by their counsel, prayed the court to instruct the jury as follows:

9. If the jury shall find that part or parts of said article as published in the *Progressive Age* are libelous which were not composed by the defendants or any of them, then the jury should not consider the same in assessing any damage against the defendants if they shall find any verdict whatever against the defendants.

But the court refused to instruct the jury as prayed and granted the instruction in a modified form, as follows:

9. If the jury shall find that part or parts of said article as published in the Progressive Age are libelous which were not composed or inspired by the defendants or any of them, then the jury should not consider the same in assessing any damage against the defendants if they shall find any verdict whatever against any one or more of the defendants.

To which ruling of the court in refusing to grant the said instruction as prayed and in granting the same as modified by the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

10. If the jury shall find from the evidence that the letter of February 13, 1894, signed by John Leetch, general manager, was not written by him as such general manager and was not subsequently ratified or affirmed by the action of the board of directors of the defendant The Washington Gas-light Company, then said company cannot be bound by the said action of Leetch, and the jury must find a verdict in its favor.

But the court refused so to instruct the jury as prayed and granted said instruction in a modified form, as follows:

10. If the jury shall find from the evidence that the letter of February 13, 1894, signed by John Leetch, general manager, was not written by him as such general manager and for and in behalf of said Washington Gas-light Company, but personally and for himself only, and was not subsequently ratified or affirmed by the action of the board of directors of the defendant The Washington Gas-light Company, then said company cannot be bound by the said action of Leetch, and the jury must find a verdict in its favor.

To which ruling of the court in refusing to grant said instruction as prayed and to the granting of the said instruction as modified by the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

11. If the jury find from the evidence that the letter of February 13, 1894, signed by John Leetch, general manager, was not written by him in the discharge of his authorized duties as such general manager and without the knowledge of the other defendants in this case, then the jury must find that such act was the individual act of the said Leetch, and they must find in favor of the other defendants.

But the court refused so to instruct the jury, and modified the said instruction as follows:

"I have modified that one, gentlemen, by saying to you that the word 'authorized' there is not to be understood as meaning that the company, by its board of directors or by its officers, must have expressly authorized him to write the letter. That is not necessary. If he was acting as general manager of the company and this particular kind or class of correspondence was within the purview of his general powers of general management, then the company is

bound by it, although they did not expressly authorize it. That is what that means."

To which ruling of the court in refusing to grant said instruction as prayed and to the granting of the same as modified by the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows :

12. If the jury find that the letter of February 13, 1894, signed by John Leetch, general manager, contained a truthful statement of facts and could not, from a fair interpretation of its language, be said to convey the impression that the plaintiff had given testimony under oath before a committee of Congress in February, 1893, then the said letter does not furnish a basis for the libel complained of, and they must find for the defendants.

But the court refused so to instruct the jury and granted said instruction in a modified form, as follows :

12. If the jury find that the letter of February 13, 1894, signed by John Leetch, general manager, contained a truthful statement of facts and could not, from a fair interpretation of its language, be said to convey the impression that the plaintiff had given testimony before a committee of Congress in February, 1893, then the said letter does not furnish a basis for the libel complained of, and they must find for the defendants.

To which ruling of the court in refusing to grant said instruction as prayed and to the granting thereof as modified by the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows :

13. The jury is instructed that the letter of February 13, 1894, signed John Leetch, general manager, is a privileged communication, and before it can find a verdict in this case against the defendants it must find the existence of malice against the plaintiff—that is, an intent to injure the plaintiff—as the motive of the defendant or defendants in writing such letter, and its verdict must be in favor of any and all the defendants in whom no malice or intent to injure the plaintiff is shown to exist at the time of the writing of the said letter.

But the court refused so to instruct the jury ; to which ruling of the court the defendants, by their counsel, then and there excepted.

And thereupon, at the request of counsel for the defendants, the court granted the following instruction :

14. The jury is instructed that the plaintiff is not entitled to recover punitive damages in this case against the defendant company or against either of the other defendants, but only such damages as the evidence proves that he has sustained on account of the action of the said defendants, if any.

And thereupon counsel for the defendants prayed the court to grant the following instruction to the jury :

15. The jury is instructed that if the plaintiff has not proved that

he was prevented from getting employment by the reason of the publication of this article, and that that reason, to wit, this publication, was given to him by those parties from whom he sought
70 employment as the reason for their refusing to employ him, then he can recover only nominal damages.

But the court refused to grant said instruction to the jury; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

16. If the jury find from the evidence that the letter written by the defendant John Leetch of February 13, 1894, to the editor of the Progressive Age was neither originally authorized or approved by any vote, order, or other action of the board of directors of the Washington Gas-light Company or was not subsequently ratified by the said board of directors, then their verdict should be in favor of the said Washington Gas-light Company.

17. If the jury find from the evidence that the plaintiff did not make any effort to secure employment for a year following his resignation as superintendent of the defendant company in June, 1893, then, and as this action was commenced on June 9, 1894, and substantially within such year, *then* the plaintiff, having failed to allege or prove special damage, cannot recover for any damage accruing to him subsequent to the commencement of this action, and their verdict, if at all, should be for nominal damages.

18. If the jury find that the letter written by the defendant Leetch to the editor of the Progressive Age of February 13, 1894, taken in connection with the admission of counsel for the plaintiff that questions are put by and answered before committees of Congress by persons who are not put under oath, does not clearly charge that the statements made by the plaintiff in 1893 were so made under oath, then the defendants nor any of them cannot be charged with imputing to the plaintiff the offense of committing perjury, and the verdict should be for the defendants; or, if they should find at all for the plaintiff, they must find nominal damages merely.

19. If the jury believe that the general publication of the testimony given by the plaintiff in 1894 in the public prints was the real cause of the plaintiff's failure to thereafter obtain employment from persons or corporations engaged in the manufacture of gas or to receive any reply to his applications to any such persons or corporations for such employment and such result was not accomplished alone by the publication of the article in the Progressive Age, then, if they find for the plaintiff, they should give no verdict for damages arising from his failure to secure employment.

20. If the jury find from the evidence that the article set out in the declaration as published in the Progressive Age of March 1, 1894, differs materially from the letter of February 13, 1894, signed by John Leetch, then the jury must find a verdict for the defendant.

21. If the jury find from the evidence that Mr. Lansden went to the secretary at the request of the president for the purpose of fur-

71 nishing the president with a computation of the cost of making gas, and that Mr. Bailey furnished him with the footings of the various expense items asked for by Lansden, and that Lansden himself made the calculation, then the items as to the cost of gas in 1893, contained in the paper in his own handwriting, was substantially the statement of Lansden as to the cost of gas to the Washington Gas-light Company.

But the court refused to grant each or any of the said instructions; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted as to each and every one of the said instructions.

And thereupon the court, of its own motion, as a substitute for defendants' prayer No. 15, instructed the jury as follows:

If the jury shall find for the plaintiff against one or more of the defendants, and shall also find from the evidence that the plaintiff has not been prevented from obtaining employment by the publication of the article complained of, but that if he has failed to obtain employment such failure arose from the evidence which he gave before the congressional committee in 1894 or from any other cause than the publication of said article or such part or parts thereof as the defendants against whom you may find are responsible for, then you should not consider his failure to find employment in determining the damages to be awarded the plaintiff.

To which ruling of the court in granting the said instruction in lieu of the defendants' prayer No. 15 the defendants, by their counsel, then and there duly excepted.

And thereupon the court, of its own motion, instructed the jury as follows:

GENTLEMEN OF THE JURY: This is an action by the plaintiff against the defendants to recover damages alleged to have resulted to the plaintiff by reason of a publication in the "Progressive Age" which is said to be libelous, and for the publication of which, or at least portions of which, it is claimed that the defendants or some of them are liable.

In order for the plaintiff to recover, it must appear to you not only that the publication was libelous, but that the defendants or some of them are responsible for the libelous portions, or at least some of the libelous portions, of the article, and that damages resulted to the plaintiff by reason of such publication. A publication is said in law to be libelous when it charges the plaintiff with the commission of a crime or with any action, conduct, or language that would naturally tend to hold him up to public scandal or disgrace.

That portions of this article complained of, published in the Progressive Age, are of that character there can be no doubt. There is no doubt of its libelous character in some particulars.

The most important question for your consideration, however, is whether the defendants or either of them, and, if so, which and who of them, are liable for the publication. In order for a person to be

72 liable for a publication they need not write the article themselves; they need not necessarily have control of the paper in which it is published. If they have any agency in the publication; if they request the publication, directly or indirectly, and the publication takes place because of that request or incitement or inducement thereto held out or requested by the defendant, such defendant is as liable as if he had written, composed, or expressly requested the publication or, indeed, had made the publication himself.

Now, the counsel for the parties on either side here have asked me to instruct you, in language which they have employed themselves, upon the details of that question, and I will read those instructions which I have granted without attempting to go over the subject generally myself further than I have already done. What I have said has been to call your attention particularly to the important question you have to determine, and that is whether these defendants or any one of them, under the facts of this case, are chargeable with having published or caused or procured the publication of any part of any of the libelous parts of this libelous publication.

On behalf of the plaintiff I have granted two instructions directed to that particular question, and I now read you the first one:

"If the jury believe from the evidence that the letter dated February 13, 1894, referred to in the deposition of E. C. Brown and purporting to be signed by the defendant John Leetch, was in fact written by said defendant and by him forwarded or sent to said Brown, and that at the time of so writing and sending the said Leetch was the general manager of the defendant The Washington Gas-light Company, and that he so wrote and sent the said letter in the course of his duties as such general manager of said company; and if they further find from the evidence that at the time of such writing and sending the said Brown was, and was known to the said Leetch to be, the publisher of a newspaper or periodical called 'The Progressive Age,' and that said paper then was, and was known to the said Leetch to be, devoted to the interests of, and to have an extensive circulation among, gas producers and manufacturers throughout the country, then it is a question for the jury to determine, from all the facts and circumstances in the case, as disclosed by the testimony, whether the said letter was or was not so written and sent for the purpose of supplying the data which it contains for a publication in said Progressive Age or with the knowledge that it was likely to be or probably would be used for such purpose; and if the jury believe from the evidence that it was so written and sent maliciously for such purpose or with such knowledge, and that the article complained of in the plaintiff's declaration was in fact published and circulated in said Progressive Age, then, to the extent that the contents of said article were suggested and inspired by said letter, if the jury shall believe from the evidence that such contents were so suggested and inspired, the defendants The Washington Gas-light Company and Leetch are legally responsible for the publishing of said article; and if the

jury believe from the evidence that said article falsely and maliciously charges the plaintiff with having testified contradictorily and falsely before any committee of Congress from improper motives and in violation of his duty to the Washington Gas-light Company, his former employer, and that such charges were fairly and naturally suggested and inspired by said letter, then the plaintiff is entitled to a verdict against the defendants The Washington Gas-light Company and Leetch in this action."

The second instruction which I have granted at the request of counsel for the plaintiff on this point is in the following language:

"If the jury shall find from the evidence each and every of the several questions of fact set forth and submitted to them in the foregoing first instruction in favor of the plaintiff; and if they shall further believe from the evidence that the figures as to the cost of the manufacture and distribution of gas set forth in the paper which has been referred to as the answers of Lansden in 1893, as they appear in said answer, were furnished Mr. Lansden from the books of the company for the purpose of being inserted in said paper and were not figures produced or arrived at by him as to the cost of either such manufacture or distribution; and if they further believe from the evidence that the defendant Charles B. Bailey well knew that said figures were so furnished said Lansden from the company's books, and that they did not represent said Lansden's own estimate or knowledge of the cost of either the manufacture or the distribution of gas, but that the said defendant, Bailey, nevertheless, on being shown by Mr. Leetch the letter of E. C. Brown of February 12, asking information in reference to the testimony given by Mr. Lansden in 1894, called the attention of said Leetch to the said so-called Lansden answers of 1893 and gave them to him for the purpose of enabling him to communicate them to said Brown as Lansden's own statement in regard to the actual cost of such manufacture and distribution and as tending to impeach his sworn testimony before the committee of Congress in 1894 and maliciously intended that the same should be communicated to said Brown for the purpose aforesaid, then the jury would be justified in finding for the plaintiff against the defendant Bailey, as well as against the defendants Leetch and The Washington Gas Light Company."

You will notice, gentlemen, that the first instruction is aimed at informing you under what circumstances you may or may not find against the Washington Gas-light Company and Leetch. The second is designed to bring to your attention the state of facts under which you may or may not find against the defendant Bailey.

There is no prayer granted or asked by the plaintiff's counsel directed specially to informing you as to whether you may or may not find against the other two defendants, McLean and Orme, and I do not understand that he earnestly insists upon a verdict against them personally. I can only say to you that the evidence tending to show that they are personally liable is slight, and I submit the case to you with that expression, leaving it to your discretion to find for or against them, as you may think best.

I do not understand, however, that the plaintiff seriously claims a verdict against them personally.

74 It will be observed that the two foregoing instructions require the jury to find that the said Leetch acted maliciously in order to justify the jury in finding against him and the Washington Gas-light Company, and that the said Bailey acted maliciously in order to justify a verdict against him; but if you believe from the evidence that they communicated any false and libelous matter about the plaintiff to said Brown, knowing it to be false, with the intent or consent, express or implied, that the same should be published, you will be justified in finding malice therefrom, unless you shall believe from the whole evidence that no malice existed. The meaning of malice as here used is not confined to its ordinary meaning of hatred or ill will, but means also an intention to injure the plaintiff or a reckless disregard of his rights and of the consequences which might result to him from the false publication.

Now, gentlemen, upon this point of the liability of the defendants or any of them for this publication or any part of it, I have granted four instructions on behalf of the defendants, which I will now read to you, the first one being numbered 7 in their series. It is as follows:

"If the jury shall find from the evidence that the defendant did not request, solicit, intend or inspire the publication of any article in 'The Progressive Age' of or concerning the plaintiff, and that the article set forth in the plaintiff's declaration was published without their knowledge or procurement, direct or indirect, then their verdict should be for the defendants and for each defendant not so participating in the publication thereof."

The next one for the defendants is numbered 10 in their series, and reads as follows:

"If the jury shall find from the evidence that the letter of February 13, 1894, signed by John Leetch, general manager, was not written by him as such general manager and for and in behalf of said Washington Gas-light Company, but personally and for himself only, and was not subsequently ratified or affirmed by the action of the board of directors of the defendant The Washington Gas-light Company, then said company cannot be bound by the said action of Leetch, and the jury must find a verdict in its favor."

The next one is numbered 11, and reads as follows:

"If the jury find from the evidence that the letter of February 13, 1894, signed by John Leetch, general manager, was not written by him in the discharge of his authorized duties as such general manager and without the knowledge of the other defendants in this case, then the jury must find that such act was the individual act of the said Leetch, and they must find in favor of the other defendants."

I have modified that one, gentlemen, by saying to you that the word "authorized" there is not to be understood as meaning that the company, by its board of directors or by its officers, must have expressly authorized him to write the letter. That is not necessary. If he was acting as general manager of the company and this par-

75 ticular kind or class of correspondence was within the purview of his general powers of general management, then the company is bound by it, although they did not expressly authorize it. That is what that means.

The 12th, which has been granted, is in this language:

"If the jury find that the letter of February 13, 1894, signed by John Leetch, general manager, contained a truthful statement of facts and could not, from a fair interpretation of its language, be said to convey the impression that the plaintiff had given testimony before a committee of Congress in February, 1893, then the said letter does not furnish a basis for the libel complained of, and they must find for the defendants."

You will see, gentlemen, that these instructions on both sides submit to your judgment a construction of this letter of Leetch's of the 13th of February, 1894, as to whether you will or will not draw the inference from that letter that the parties authorizing it and sending it intended and expected the contents of it to be published in this publication that is complained of, and whether this publication, the libelous part of it, is fairly inferred and obtained from that letter. Those are the important questions.

Now, gentlemen, that leaves only the question of damages. Of course, if you find for all the defendants, if you find that none of the defendants are liable for this publication, you would find for the defendants, and that would end your duties in this case. You would not have to consider the question of damages; but if you should take the other view and find that the defendants or any one or more of them are liable for this publication under the instructions I have given you and the evidence, then it would be necessary for you to determine the amount of damages which should be awarded by you in favor of the plaintiff against the defendants or such of them as you should find; and upon that question of the amount of damages I have granted some instructions at the instance of both parties, and I now give you the one asked for by the counsel for the plaintiff, which is numbered 3 in his series:

"If under the testimony and the instructions of the court your verdict shall be for the plaintiff as against any of the defendants, then it is your duty to award the plaintiff, as against such defendants, such damages as you believe from the evidence shall fully compensate him for the injuries, if any, suffered by him from the conduct of said defendants complained of in the declaration and which you shall find sustained by the proofs, in estimating which damages you may consider the language used in the publication complained of in so far as you shall find from the evidence that said language was inspired by said defendants, the nature of the charges and imputations conveyed by said language, the vehicle used in giving publicity to the same, and the mental suffering, if any, which you find from the evidence has thereby been occasioned to the plaintiff."

In the same connection, I give you one numbered 9 in the series of the defendants, which is as follows:

"If the jury shall find that part or parts of said article as pub-

lished in the 'Progressive Age' are libelous which were not
 76 composed or inspired by the defendants or any of them,
 then the jury should not consider the same in assessing any
 damage against the defendants if they shall find any verdict what-
 ever against any one or more of the defendants."

And number 14 in the same series:

"The jury is instructed that the plaintiff is not entitled to recover
 punitive damages in this case against the defendant company or
 against either of the other defendants, but only such damages as the
 evidence proves that he has sustained on account of the action of
 the said defendants, if any."

The plaintiff does not contend that he is entitled to recover what
 is called punitive damages, but only compensatory damages. Com-
 pensatory damages are those which will compensate and pay fairly
 the plaintiff for such injury and suffering as he has sustained.
 Punitive damages would permit you to go beyond that and, after
 you had fully compensated the plaintiff, to put on something to
 punish the defendant, but that is not claimed in this case, and you
 will not consider damages, if you should find for the plaintiff, be-
 yond the question of what it will be fair and reasonable to give him
 in compensation for such injuries and loss as he has sustained in
 his business and his reputation and his feelings.

There was another prayer asked by the defendants on this ques-
 tion of damages which was not in accordance with my notion, and
 I have written one of my own covering the point, which I will
 now give you. It takes the place of the one numbered 15 in their
 series:

"If the jury shall find for the plaintiff against one or more of the
 defendants, and shall also find from the evidence that the plaintiff
 has not been prevented from obtaining employment by the publica-
 tion of the article complained of, but that if he has failed to obtain
 employment such failure arose from the evidence which he gave
 before the Congressional committee in 1894 or from any other cause
 than the publication of said article or such part or parts thereof as
 the defendants against whom you may find are responsible for, then
 you should not consider his failure to find employment in deter-
 mining the damages to be awarded the plaintiff."

In other words, gentlemen, if the publication of the article did
 not prevent him from obtaining employment, but something else
 did, then the defendants are not liable for that element of dam-
 ages.

There has been a good deal said here about "dollar gas" and
 "cheap gas" and "high gas," and you, gentlemen, may be like all
 the rest of us and have some notion or feeling of your own upon
 that subject, but whatever your notion may be or whatever your
 feeling may be I need not caution you that that is to have no influ-
 ence whatever, either in inducing you to find a verdict for the de-
 fendants or for the plaintiff, or any influence whatever upon the
 amount of damages you shall award, if you should find for the
 plaintiff. We are not trying the question of whether the gas com-

pany ought or should or may or might furnish gas cheaper than they are doing. We have only to do with the question whether this gas company or the officers of it or any of them are liable for the publication of this libel. If so, they should be held liable for it; if they are not, they should not, and if they are liable for it, any of them, then your verdict should hold them liable only for reasonable and fair compensatory damages and for nothing more.

And thereupon the defendants, by their counsel, again separately and severally excepted to the repetition in the charge of each of the several prayers granted on behalf of the plaintiff and to the granting of each of the prayers of the defendant- as modified by the court.

And thereupon the defendants, by their counsel, separately and severally excepted to the following portions of said charge:

"In order for the plaintiff to recover, it must appear to you not only that the publication was libelous, but that the defendants or some of them are responsible for the libelous portions, or at least some of the libelous portions, of the article, and that damages resulted to the plaintiff by reason of such publication. * * *

"That portions of this article complained of, published in the *Progressive Age*, are of that character there can be no doubt. There is no doubt of its libelous character in some particulars."

"In order for a person to be liable for a publication they need not write the article themselves and need not necessarily have control of the paper in which it is published. If they have any agency in the publication; if they request the publication directly, or indirectly, and the publication takes place because of that request or incitement or inducement thereto held out or requested by the defendant, such defendant is as liable as if he had written, composed, or expressly requested the publication or, indeed, had made the publication himself."

And be it further remembered that each of the separate and several exceptions taken by counsel for the respective defendants to each of the separate and several rulings of the court during the progress of said trial; each one of said separate and several exceptions taken by counsel for the respective defendants to the granting by the court of each of the prayers granted on behalf of the plaintiff; each of the said separate and several exceptions taken by counsel for the respective defendants to the refusal of the court to grant each of the prayers asked on behalf of the defendant- which were refused by the court; each of the said separate and several exceptions taken to the granting of said separate and several instructions on behalf the defendants, with modifications thereto made by the court; each of the said separate and several exceptions taken by counsel for the respective defendants to the charge of the court to the jury, as hereinbefore set forth, were so taken by counsel for the respective defendants then and there before the jury retired separately and severally, and said exceptions and each of them were then and there separately and severally duly noted upon the minutes of the justice presiding at the trial, and counsel for the respect-

ive defendants then and there prayed the court and now pray the court to sign and seal this bill of exceptions, to have the same
 78 force and effect as if each of the said exceptions had been separately and severally set forth in a separate bill of exceptions, and, at the request of said counsel for the defendants, the same is accordingly signed and sealed and made a part of the record in this cause, now for then, this sixth day of May, A. D. 1896.

CHAS. C. COLE, [SEAL.]
Asso. Justice.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } 83:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 153, inclusive, to be true copies of originals in cause No. 36410, at law, wherein Thomas C. Lansden is plaintiff and The Washington Gas Light Company (a corporation); John R. McLean, president; Charles B. Bailey, secretary; William B. Orme, assistant secretary, and John Leetch, general superintendent, are defendants, as the same remains upon the files and records of said court.

In testimony whereof I hereunto subscribe
 Seal Supreme Court my name and affix the seal of said court, at
 of the District of the city of Washington, in said District, this
 Columbia. 18th day of May, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 583. The Washington Gas Light Company, Charles B. Bailey, and John Leetch, appellants, *vs.* Thomas G. Lansden. Court of Appeals, District of Columbia. Filed May 23, 1896. Robert Willett, clerk.

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TUESDAY, *October 13th*, A. D. 1896.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. }
 BAILEY, and JOHN LEETCH, Appellants, } No. 583.
vs.
 THOMAS G. LANSDEN. }

Upon consideration of a suggestion of the diminution of the record filed by Mr. J. J. Darlington, of counsel for the appellee, in the above-entitled cause, from the supreme court of the District of Columbia, praying the court for a writ of certiorari directed to the justices of the said supreme court of the District of Columbia, commanding them to send to this court forthwith a true copy of the papers enumerated in a motion filed in this cause October 13, 1896, it is ordered that said writ issue as prayed.

80

Return to Writ of Certiorari.

Court of Appeals of the District of Columbia, October Term, 1896.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY, and JOHN LEETCH, Appellants,
vs.
 THOMAS G. LANSDEN. } No. 583.

Appeal from the supreme court of the District of Columbia.

Filed October 13, 1896.

THE UNITED STATES OF AMERICA, *ss* :

[Seal Court of Appeals, District of Columbia.]

The President of the United States of America to the justices of the supreme court of the District of Columbia, Greeting :

Whereas in a certain suit in said supreme court between Thomas G. Lansden, plaintiff, *vs.* The Washington Gas Light Company (a corporation); John R. McLean, president; Charles B. Bailey, secretary; William B. Orme, assistant secretary, and John Leetch, general superintendent, defendants, law, No. 36410, which suit was removed to the Court of Appeals of the District of Columbia by virtue of an appeal agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit :

1. "The motion for a new trial presented by defendants and the grounds of said motion ;"

81 2. "The appeal bond filed in this cause :"

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, the 13th day of October, A. D. 1896.

ROBERT WILLETT,

Clerk Court of Appeals of the District of Columbia.

Motion for New Trial.

Filed March 10, 1896.

In the Supreme Court of the District of Columbia

THOMAS G. LANSDEN
vs.
 WASHINGTON GAS LIGHT COMPANY. } At Law. No. 36410.

Comes now the defendants, The Washington Gas Light Company, Charles B. Bailey, and John Leetch, and move the court to set aside

the verdict and grant a new trial in the above-entitled cause for the following reasons:

First. Because the verdict is contrary to the evidence.

Second. Because the verdict is contrary to the law.

Third. Because the verdict against the defendant The Washington Gas Light Company is not sustained by the evidence.

Fourth. Because the verdict against the defendant Charles B. Bailey is not sustained by the evidence.

Fifth. Because the verdict against the defendant John Leetch is not sustained by the evidence.

Sixth. Because the errors of law in the rulings of the judge presiding at the trial which were excepted to by the defendants.

Seventh. Because of errors of law in the instructions to the jury by the judge presiding at the trial and accepted to by the defendants.

Eight. Because of errors of law by the judge presiding at the trial in overruling the motion of the defendants, made at the close of the testimony, to take the case away from the jury and direct a verdict for the defendants.

Ninth. Because the damages awarded by the jury are excessive.

BRITTON & GRAY,

WEBB & WEBB & LINDSLEY,

Attorneys for Defendants.

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Bond for Appeal.

Filed April 24, 1896.

In the Supreme Court of the District of Columbia.

THOMAS G. LANSDEN

vs.

WASHINGTON GAS LIGHT COMPANY *et al.*

} At Law. No. 36410.

Know all men by these presents that we, Washington Gas Light Company, Charles B. Bailey, and John Leetch, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto the above-named Thomas G. Lansden in the full sum of twenty thousand dollars, to be paid to the said Thomas G. Lansden, his executors or administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, or assigns, firmly by these presents.

Sealed with our seals and dated this 22nd day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, the above-named Washington Gas Light Company, Charles B. Bailey, and John Leetch have prosecuted an appeal to the Court of Appeals of the District of Columbia to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the

above-named Washington Gas Light Company, Charles B. Bailey, and John Leetch shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.]

WASHINGTON GAS LIGHT CO.

JOHN R. McLEAN, *President.*

CHARLES B. BAILEY. [SEAL.]

JOHN LEETCH. [SEAL.]

Attest: WILLIAM B. ORME, *Secretary.*

AMERICAN SURETY COMPANY

OF NEW YORK,

[SEAL.]

By DAVID B. SICKELS,

2d Vice-President.

Attest: CORTLANDT S. VAN RENSSELAER, *Attorney.*

— — —, *Secretary.*

Sealed and delivered in presence of—

GEO. W. WHITWELL.

HOWARD ALLISON,

As to Am. S. Co.

Approved the 24th day of April, 1896.

CHAS. C. COLE,

Asso. Justice S. C. D. C.

83 Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, that the foregoing are true and correct copies of the motion for a new trial and the bond for appeal to the Court of Appeals of the District of Columbia filed in the case of Thomas G. Lansden *vs.* The Washington Gas Light Company *et al.*, No. 36410, at law, containing the matter omitted from the transcript of the record heretofore transmitted to said Court of Appeals.

Seal Supreme Court
of the District of
Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court of the District of Columbia the 13th day of October, A. D. 1896.

JOHN R. YOUNG,

Clerk Supreme Court, District of Columbia.

(Endorsed :) No. 583. The Washington Gas Light Co. *et al.*, appellants, *vs.* Thomas G. Lansden. Return to writ of certiorari. Court of Appeals, District of Columbia. Filed Oct. 13, 1896. Robert Willett, clerk.

TUESDAY, *October 20th*, A. D. 1896.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY, and JOHN LEETCH, Appellants, } No. 583.
vs.
 THOMAS G. LANSDEN.

The argument in the above-entitled cause was commenced by Mr. W. D. Davidge, attorney for the appellants.

WEDNESDAY, *October 21st*, A. D. 1896.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY, and JOHN LEETCH, Appellants, } No. 583.
vs.
 THOMAS G. LANSDEN.

Upon motion of Mr. John S. Webb, thirty minutes' additional time is allowed each side for argument. The argument in the above-entitled cause was continued by Mr. J. J. Darlington, attorney for the appellee, and was concluded by Mr. John S. Webb, attorney for the appellants.

85 THE WASHINGTON GAS LIGHT COMPANY, CHARLES B. BAILEY, and JOHN LEETCH, Appellants, } No. 583.
vs.
 THOMAS G. LANSDEN.

Mr. Chief Justice ALVEY delivered the opinion of the court :

This is an action for libel brought by Lansden, the appellee, against The Washington Gas Light Company, John R. McLean, its president, Charles B. Bailey, its secretary, William B. Orme, its assistant secretary, and John Leetch, its general superintendent. The declaration charges that the defendants did compose and publish, and did cause and procure to be composed and published, a certain libel, set out in the declaration, of and concerning the plaintiff, and of and concerning certain testimony by him given before a committee of Congress, in a certain newspaper or periodical called "The Progressive Age," printed in the city of New York.

The defendants all pleaded not guilty, and issue was joined on that plea. The verdict and judgment were for the plaintiff against the gas company, Bailey and Leetch, but there does not appear to have been any verdict or finding for or against the other defendants. This appeal is brought by the defendants against whom verdict and judgment were rendered.

The article alleged to be libelous is set out *in extenso* in the declaration, and also in the bill of exception. It is headed, "The acrobatic performances of Lansden." It is not pretended that any of the defendants actually composed the libel as published in "The Progressive Age," but it is contended that some of the defendants, at least, furnished the data, and procured or conducted to the composition and publication of the article complained of as libelous; and though

none of the defendants may have actually dictated the terms of the article, yet, it is contended, if they procured or conduced to the writing and publication of the libel, they are responsible therefor. In such case the libel is to be considered as published by their authority.

It appears that Lansden, the plaintiff, was in the employ of the defendant gas company as general superintendent of the gas works, from the 1st of November, 1886, until the 1st of June, 1893. He was by profession a gas engineer; his business being to construct and manufacture gas works and manufacture gas; and he had been engaged in that profession for about 30 years.

In January, 1893, action was taken by the House of Representatives looking to the reduction of the price of gas supplied by the defendant company to the Government buildings in the District of Columbia, to seventy-five cents per one thousand feet, and the plaintiff, Lansden, then in the employ of the gas company, was called upon by the president of that company to make a written statement of what he could testify to, if called as a witness before the committee of the House. He furnished such statement in his own handwriting, though he testifies and shows that some of the data thus furnished were supplied from the books of the gas company, for which he was in nowise responsible, and for the correctness of which he expressly disclaimed knowledge or responsibility at the time of delivering the statement to the president of the company. This statement, being placed in the hands of the president of the company, was thereupon placed in the care and keeping of Bailey, the secretary, to be preserved for future use. The plaintiff, however, was not called upon as a witness at that session of Congress; and, in the meantime, that is, on the 1st of June, 1893, the plaintiff left the employment of the gas company, and was succeeded in the office of general superintendent of the company by John Leetch, 86 one of the defendants. At the next session of Congress, that is, in 1894, an investigation was directed in respect of the reduction of the price of gas to one dollar, instead of one dollar and twenty-five cents per thousand feet, the then existing price. Before the committee of that session of Congress, the plaintiff appeared and gave testimony, and which, apparently, was in conflict with and contradictory of the estimates made and set forth in the preceding statement made and delivered to the president of the company in 1893.

In the trial of this case, the plaintiff testified that he prepared a memorandum, at the request of the president of the company, in 1893, in the form of questions and answers, except that, as originally submitted to the president, the memorandum contained nothing as to the cost of gas; that the president said to him, "You say nothing here about the cost of gas," and he told Mr. McLean that the cost of gas must come from him, the president, or from the secretary; that he was thereupon furnished with a statement, putting the cost of gas in the holder at 48.38 cents per thousand, and the cost of distribution at 40.09 cents per thousand; that the plaintiff said to McLean at the time, "It cannot be possible that your gas costs

that much," to which he, McLean, replied that they were entitled to charge interest on their investment, and that the plaintiff then wrote in those figures, stating at the time, "It does not make any difference to me. If the committee ask me, I will give these as your figures." The plaintiff further testified that the items of cost could only come from the books, which were kept at the office of the secretary of the company; that the plaintiff could approximate the cost of gas in the holder from knowing the amount of coal that was used, and the cost of labor, but that there were many items entering into its manufacture which were not purchased by the plaintiff, and the cost of which was not furnished to him; that he never knew the actual cost of the manufacture of gas, and could not know it unless he had had access to the books of the company; that he never saw the books, either during his employment with the defendant company, or afterwards; and that it would have been impossible for him, estimating merely as an expert, and without the books of the company, to have figured the cost down to the hundredth part of a cent, as was done in the figures inserted in the memorandum.

The plaintiff further testified that he was not called as a witness on behalf of the defendant company in 1893, and gave no testimony before the committee that year. He states that the memorandum referred to was furnished for the private use of the defendant McLean, and was left with him for his own use. He further states, that in February, 1894, an investigation was made by the Senate committee into the cost of the manufacture of gas, and the plaintiff, by invitation, appeared before that committee, and testified that, in his opinion as an expert, gas could be put in the holder at from 30 to 32 cents per thousand feet, and could be distributed at from 20 to 22 cents per thousand feet.

After this testimony of the plaintiff had been given before the committee, and the same, or the substance thereof, published in the Washington city papers, there came a letter of inquiry from Mr. E. C. Brown, the publisher of "The Progressive Age," a journal or periodical published in New York city, of considerable circulation, and devoted to the interest of gas, electricity and water supply companies; and which letter of inquiry was dated at New York, February 12th, 1894, and was addressed to the Washington Gas Light Company, Washington, D. C. This letter was received by John Leetch, the general manager of the company. In the letter the writer says:

"I have watched with great interest the continued reports of the proceedings against your company as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Was his statement correctly reported in the Washington Star of 3rd inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information."

(Signed)

E. C. BROWN.

In reply to this inquiry the defendant Leetch, as general manager of the defendant company, by letter dated Washington, D. C., February 13, 1894, acknowledged the receipt of Brown's letter of the 12th of February, and says:

"As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement. As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for 70 cents and to the consumer for \$1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

"Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of the price of gas in Washington and made the following replies:

"Q. What does gas cost to manufacture at your works?

"A. It costs 48.38c. per thousand in the holder and 40.09c. per thousand for distribution.

"Q. Can you in any way reduce the cost of gas in the manufacturing, so your company could sell for less to the consumer?

"A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

"Q. How do the prices charged for lamps in Washington compare with other cities?

"A. They are as low as anywhere where the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps."

"You will notice that he makes a difference of about 18½ cents per 1,000 feet then as compared with his statement now, although he must know that the material used—coal and labor—is just the same now as then, except the price of naphtha, which is higher. You can try to reconcile the two statements."

(Signed)

JOHN LEETCH,

General Manager.

87 On the 14th of February, 1894, and again on the 19th of that month, Brown wrote to Leetch, addressing him as the general manager of the Washington Gas Light Company, requesting data as to the testimony of Lansden before the congressional committee, with an avowed purpose of publishing and exposing its conflicting statements. In the first of these letters Brown, in referring to a previous letter of Leetch, says:

"Your statements, as contained therein, are exceedingly interesting, I can assure you. It would seem that the inference as to the occasion for the statement could only result from one cause.

"I would ask you, if you can do so without too much trouble to yourself, to give me categorically the questions propounded to Mr. Lansden and answered by him as reported in 'The Star' of the 3d inst. I should like to reproduce exactly the questions and his replies under the former resolution of Congress, February, 1893, and follow up with the same covering the present investigation. I will

not ask you to hurry about this, for I cannot use the matter until our issue of the 1st of March, but then, I can assure you, I will take it up in the proper way. Any other facts of interest that you can give me in this connection I shall appreciate."

In the second of these letters, that of February 19, 1894, Brown says:

"I hope you are intending to give me questions propounded to and answered by Mr. Lansden during the present investigation similar to the manner in which you gave me the questions then answered by him under the former resolution, as appears in your letter of the 13th. I am wanting to treat this matter in the way it should be touched on, and I have in mind publishing Mr. Lansden's testimony on this particular point side by side."

In reply to these two letters, asking for data to enable the publisher of "The Progressive Age" to prepare and publish the article complained of in the paper to be issued on the 1st of March, 1894, Leetch, on the 20th of February, 1894, writes to Brown, and says:

"This delay in reply was my inability to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee. Today I received a copy, which I herewith enclose for your use."

(Signed)

JOHN LEETCH,
Gen'l Manager.

As will be observed, the first of the letters from Brown, that of the 12th of February, 1894, was addressed to the Washington Gas Light Company and answered by Leetch as general manager of the company, and the subsequent letters from Brown were addressed to John Leetch as the general manager of the company. These letters, it appears, were all placed among the files of papers in the office of the company, in the keeping of the secretary; and it further appears that the replies to these letters of Brown were copied in the letter book of the company kept by the secretary. There is nothing to indicate that Leetch, in furnishing the data to Brown, was acting merely on his own individual account and responsibility, irrespective of his character and position as general manager of the company, and for its benefit. On the contrary, it would clearly appear that he was acting in the interest of and for the company, in his character of general manager, and that such conduct was within the scope of his authority as such general manager of the affairs of the company. Indeed, there is nothing in the case that would even suggest that he had any mere personal interest or object to subserve in what he did, apart from the interest of the company. He was manifestly acting for the company, and as its officer and agent, and the jury have so found by their verdict.

On the 1st of March, 1894, the libelous article complained of appeared in the "Progressive Age." In that article various things are said in reference to the plaintiff Lansden, and, among others it is stated, that "a congressional committee has been investigating the Washington Gas Light Company. Complaints were lodged by

some of the patrons of the company with the committee on the District of Columbia, which has jurisdiction in all matters affecting affairs connected with the capital city, and Congress ordered an investigation. Many witnesses have been heard on both sides of the question, and among them appeared Mr. Thomas G. Lansden, who had filled the position of superintendent with this company for a period of seven years prior to his resignation, in June of last year. This gentleman did not come forward, as might have been expected, to render such help as he could to assist his former associates over their present difficulties and to say a good word in behalf of the company with which he had so long been identified and by which he had been most generously requited; on the contrary, Mr. Lansden has arrayed himself within the ranks of those who sought to tear down and lay waste the business and emoluments of his former employers. Moreover, by reason of the nature of his testimony, Mr. Lansden has caused a report of his statements to be circulated the length and breadth of the land, and the subject-matter contained therein is well calculated to do the utmost harm to gas interests everywhere. Mr. Lansden's statements, as made under oath before this investigating committee, have been telegraphed from one end of the country to the other, and newspapers in many of the principal cities throughout the United States have copied the statements which have appeared in all Washington papers during the progress of the investigation. To what extent is best shown when we say that more than a score of newspapers containing Mr. Lansden's statements about the cost of making and distributing gas have come to our notice since his testimony was given, and the end is not yet. The figures of cost supplied by Mr. Lansden are startling, to say the least, and more than one gas company will, we apprehend, ere long, find itself confronted with his figures and compelled to battle hard in an effort to overcome the bad effects on the public mind.

"It is because of the general interest that is likely to suffer for Mr. Lansden's indiscretion that we give heed to the matter, not through a desire to extend special favor to the Washington company; nor is it because of any ill-will entertained by us for Mr.

88 Lansden. If the cause of the company is just, as we believe it to be, it will come out of the investigation a victor. The present investigation is not the first in which Mr. Lansden has appeared as witness. Only a year ago a similar inquiry, emanating from the same quarter, was instituted against the Washington Gas Light Company. Then Mr. Lansden appeared as a witness in behalf of the company. He at that time occupied the position of superintendent with the company. His testimony then and that of this year are so sadly at variance that we should be remiss in our duty if we permitted the occasion to pass without directing attention to these differences. Moreover, we should be guilty of withholding from gas managers information which will be of material assistance to them in breaking the force and effect of Mr. Lansden's recent statements.

"Under a former resolution of Congress bearing date of February,

1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of the price of gas at Washington. We herewith give the questions propounded to Mr. Lansden during the investigation of last year and his replies thereto. This we follow with the interrogatories put to him and his answers during the present investigation."

The writer then proceeds to set out, *in totidem verbis*, for the purpose of showing the variant and conflicting statements in the testimony of the plaintiff, the interrogatories and answers of 1893 being those furnished by the defendant Leetch in his letter of February 12th, 1894, to Brown, and the interrogatories and answers of 1894 being those, as we may suppose, that were furnished by Leetch in his letter of February 20th, 1894, enclosing copy of report of the committee of Congress, to be used by Brown.

The writer of the libelous article then proceeds:

"From the foregoing extracts of this witness' testimony only one of two conclusions can be arrived at, and we are too sensible of the reader's power of analysis and feel too keenly for the witness to heap coals of fire on the head of one who, it is only too evident, has allowed his sense of justice to be distorted by real or fancied grievances. The testimony given by Mr. Lansden in 1893 states in effect that there is no way open to his company by which it could reduce the cost of manufacturing gas. In 1894 he tells the committee that, taxes and repairs added—items not considered in the inquiry of the previous year—the cost of gas delivered to the consumer could be brought within 70 cents, or about 18½ cents less per thousand than he quoted as the lowest manufacturing and distributing cost the year before; and yet Mr. Lansden must know that the generating apparatus at the Washington works is the same as when he filled the position of superintendent; that the cost of all materials used, coal and labor, are just the same, save only nap-tha, which is now higher in price than when he testified a year ago.

"Every man must be the custodian of his own conscience, and it is not for us to decide how Mr. Lansden will reconcile himself to his present unhappy position. If the gentleman has given up all thought of again associating himself with a gas enterprise, possibly he is indifferent to the effect of his predicament, but if he still entertains an idea of continuing his former calling he should lose no time in setting himself straight in the eyes of his former associates. In view of the testimony, we can readily believe this will prove a most difficult undertaking; but there is always two sides to a story, and possibly Mr. Lansden may have in reserve some evidence that will enable him to sustain his present position; if so, our columns are open to him for such purpose."

It has not been seriously contended that the article itself as published is not libelous; but the question is, who are liable for the publication? Any and all publications in writing or in print, imputing to another crime, or disgraceful, or fraudulent, or dishonest conduct, or which are injurious to the private character or credit of another, or which tend to render a party ridiculous or contemptible in the relations of private life, are libelous, and an action for dam-

ages is maintainable against the writer and publisher, unless the publication is embraced within that class of communications which are termed privileged communications, or unless the libeler can prove the truth of the libel. *Digby v. Thompson*, 4 B. & Ad., 821. And so, if, by such writing or print, it be imputed to a party that he is unfit to be trusted with money, or that he is guilty of treachery or ingratitude to his friends and benefactors, or of misconduct in an office of trust, an action will lie. *Cheese v. Scales*, 10 M. & W., 488.

Of course there can be no question at this day as to the right of the plaintiff to maintain an action for libel against the gas light company, a corporation, if the corporation has authorized or made itself liable in any manner for the publication of the libel. *Phil., Wilm. & Balto. R. Co. v. Quigley*, 21 How., 202; *Fogg v. Boston & Lowell R. Co.*, 148 Mass., 513.

In this case, as we have stated before, the principal question is, whether the defendants, or any of them, against whom the judgment below was rendered, are or is responsible for the publication of the libel set out in the declaration? It is conceded that the alleged libel was not actually written and published, in the terms of the article printed in "The Progressive Age," by any of the defendants; but it is contended that the article was composed and published by their authority, or procurement, or that they conduced to such publication.

In 2 Starkie on Libel and Slander (2d Eng. ed.), 28, it is said "that the declaration generally avers that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary, either in a civil or criminal proceeding; in civil proceedings the principal is to all purposes identified with the agent employed by him to do any specific act. A consent by the master to the act of the servant in printing a libel is *prima facie* evidence of publication by the master, and an allegation that the defendant published the libel is satisfied by proof that it was published by his agent, if an authority from the principal to the agent can be proved." And again, at page 225, of the same volume, it is laid down by the author as text law, that, "according to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication; thus, if one suggest illegal matter, in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication, when it has been so effected."

And in the work of Sir Frederick Pollock on the Law of Torts, p. 168, in treating of the law of defamation, the author says: "On the general principles of liability, a man is deemed to publish that which is published by his authority. And the authority need not be to publish a particular form of words. A general request, or words intended and acted on as such, to take public notice of a matter, may make the speaker answerable for what is published in conformity to the general sense and substance of his request."

This principle would seem to result from an obvious principle of reason and justice; for otherwise an irresponsible person might be put forward, and the person really producing or inciting the publication, and without whose contribution it would not likely ever have been published, might remain in entire safety. This would not be according to the well-settled principles of law, which intend that a party who really instigates or incites a wrongful act shall be responsible therefor.

This principle of liability, as applied in the case of libel, is very fully and clearly illustrated and enforced in the case of *Parker v. Prescott*, L. R. 4 Exch. 169, in the Exchequer chamber. That action was against two defendants, and the question turned upon the sufficiency of the evidence to hold the defendants liable for the publication of the libel. The learned judge before whom the case was tried at *nisi prius* thought the evidence insufficient, and directed a verdict for the defendants. The case was taken on bill of exception into the Exchequer chamber, and was there heard before five judges, three of whom held the ruling below to have been erroneous. They held it to be clear law, that where a man makes a request of another to publish defamatory matter, of which for the purpose he gives him a statement, whether in full or in an outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher.

The case was held under advisement, and the learned justice, in delivering the opinion of the majority of the court, said: "The libels complained of were reports of certain proceedings at a meeting of the board of guardians for the parish of St. Marylebone, which were published in some local newspapers. It appeared in evidence that at the meeting a discussion took place respecting the conduct of the plaintiff towards his daughter, who was then an inmate of the workhouse, and the history of the case, as stated at the meeting, in the absence (be it observed) of the plaintiff, and the remarks made upon it, were of a highly defamatory nature; indeed, the story was spoken of by one of the defendants at the meeting as a very scandalous case with reference to the conduct of the plaintiff. The defendant Prescott was chairman of the meeting, and Ellis, the other defendant, was also present, taking part in the proceedings. Reporters of local newspapers, in which the libel appeared, attended the meeting. The following evidence was given to connect the defendants with the publication. The defendant Ellis said he hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it. This was done by several members of the board, and the chief facts were then taken down by the reporters. The defendant Prescott also said, in the course of his statement relative to the case: 'I am glad gentlemen of the press are in the room, and I hope they will take notice of it.' On which the other defendant Ellis said, 'and so do I.' The defendant Prescott also said he hoped publicity would be given to the matter. It was proved by the reporters that the reports published were a correct summary of what took place, and one of the

reporters stated that he had told the editor of the paper what the defendants had said before the publication."

It was contended that what was said by the defendants did not amount to a request to the reporters to publish the proceedings, but was a mere expression of a wish or hope that such proceedings should be published. In answer, however, to this contention the court said: "But upon consideration of the circumstances of this case, I think there was evidence for the jury on the two questions which ought to have been submitted, viz: First, of a request to publish the proceedings of the meeting relating to the plaintiff's conduct; and, second, that the reports contained a correct account of the proceedings as the defendants meant it should appear."

After stating the evidence bearing on these questions of fact, the court proceeded to say: "Whether the libelous matter published is in pursuance of, and in accordance with, the request, or a departure from it, and so unauthorized, would be a question to be considered on the circumstances of the particular case." And further on, in answer to the argument for the defense, the court said: "It was strongly urged for the defendants, that they could not be liable unless they authorized the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing, because such an outline or summary necessitates condensation and consequent alteration of language. But the argument cannot, as it seems to me, be correct. The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be to some extent those of him who makes such summary or outline; and he must, therefore, be taken to constitute him an agent for the purpose, and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeler with impunity. Again, if the very words of the libel, and not its substance, are in these cases to be regarded, a man who gives the manuscript of a libel to an agent to print and publish would not be answerable, if by accident or negligence
90 there were variations in some of the words, although not in the substance, of the libel." The ruling of the court below was reversed, and a new trial ordered.

In all such cases as the present it is a question for the jury to determine whether the corporation sought to be held liable had authorized or ratified the publication, or whether the publication complained of was made or directed by its servants or agents, in the course of their employment. *Fogg v. Boston & Lowell R. Co.*, 148 Mass. 513. In this case, as we have seen, the defendant Leetch was the general manager of the business and affairs of the gas company, and it was fully within the scope of his duties as such general manager, to protect and look to the general welfare of the company. In these and other circumstances there was evidence furnished to be submitted to the jury, to establish the fact that the libel was published by the authority of Leetch, while acting for and on

behalf of the company, and within the scope of his authority as such general manager.

This question of fact was fully and fairly submitted to the jury by the first instruction given at the instance of the plaintiff, and as modified by the court. There was a redundancy of phraseology employed, it is true, but there is nothing in the language that could mislead the jury. The plaintiff's case as against the gas company and its general manager was fully embraced by that instruction. By that instruction the jury were directed, that if defendant Leetch wrote and sent the letter of the 13th of February, 1894, to Brown, in the course of his duties as general manager of the defendant company, knowing Brown to be the publisher of the "Progressive Age," a paper devoted to the interests of gas-producers, "then it was a question for the jury to determine, from all the facts and circumstances of the case, whether the said letter was or was not so written and sent for the purpose of supplying the *data* which it contains for a publication in said 'Progressive Age,' or with the knowledge that it was likely to be or probably would be used for such purpose; and if the jury believe from the evidence that it was so written and sent maliciously for such purpose or with such knowledge, and that the article complained of in the plaintiff's declaration was in fact published and circulated in said 'Progressive Age,' then, to the extent that the contents of said article were suggested and inspired by said letter, if the jury shall believe from the evidence that such contents were so suggested and inspired, the defendant gas company and the defendant Leetch are legally responsible for the publishing of said article; and if the jury believe from the evidence that said article falsely and maliciously charges the plaintiff with having testified contradictorily and falsely before any committee of Congress, from improper motives and in violation of his duty to the Washington Gas Light Company, his former employer, and that such charges were fairly and naturally suggested and inspired by said letter, then the plaintiff is entitled to a verdict against the defendants the gas company and Leetch."

To this instruction: the court added the following, as a qualification or explanation:

"But if you believe from the evidence that they communicated any false and libelous matter about the plaintiff to said Brown, knowing it to be false, with the intent or consent, expressed or implied, that the same should be published, you will be justified in finding malice therefrom, unless you shall believe from the whole evidence that no malice existed. The meaning of malice as here used is not confined to its ordinary meaning of hatred or ill will, but means also an intention to injure the plaintiff or a reckless disregard of his rights and of the consequences which might result to him from the false publication."

With respect to the defendant Bailey, the second instruction given on request of the plaintiff presents a case against him, upon the assumption of the truth of the facts therein stated. There was evidence sufficient tending to establish those facts. And the court committed no error in refusing to direct a verdict in favor of any

of the defendants against whom the jury found a verdict. There was no ground for contending that there was any such fatal variance between the libel set forth in the declaration and the evidence, as would defeat the action as against the defendants found guilty by the verdict of the jury.

In regard to the third instruction given on request of the plaintiff, relating to the question of damages, we do not understand that there is any serious objection to that instruction. It would seem to be quite free from any substantial ground of objection. And in this connection, it is proper to observe, that the jury were expressly instructed by the fourteenth prayer of the defendants, which was granted by the court, that the plaintiff was not entitled to recover punitive damages against any of the defendants. Hence the ruling of the court in admitting evidence as to the financial condition of the defendant, the gas company, could not be prejudicial to the defendants, and that ruling, therefore, does not constitute reversible error.

The defendants offered twenty-one prayers for instruction to the jury; but of this number only four were granted. There were many questions attempted to be raised by the prayers that were rejected. Only a portion of them, however, are made the subjects of error specially assigned in this court.

By the seventh prayer of the defendants, the court was asked to instruct the jury that if they should find from the evidence that the defendants did not request or solicit the publication of the article in "The Progressive Age," and that the article set out in the declaration was published without their knowledge, then their verdict should be for the defendants. This the court refused for obvious reasons. It plainly ignored the evidence as to one of the defendants, at least; and instead of the prayer thus offered, the court instructed the jury, "that if they should find that the defendants did not request, solicit, *intend*, or *inspire* the publication of any article in 'The Progressive Age' of and concerning the plaintiff, and that the article set forth in the plaintiff's declaration was published without their knowledge or *procurement, directly or indirectly*, then their verdict should be for the defendants and for each defendant not so participating in the publication thereof."

91 The defendants excepted to the refusal of their prayer, and to the granting of the substitute therefor.

Some of the terms employed in the substituted instruction are objected to as being indefinite and inappropriate. Whether the terms objected to are the most appropriate that could have been selected to express the thought intended to be conveyed by the instruction, may admit of some question; but the instruction must be read in the light of the evidence and in connection with all the other instructions given. In so considering it, we perceive no ground for supposing that it was misleading to the jury, nor do we perceive that there was any error in the ruling of the court thereon.

In the eighth prayer of the defendants, the court was requested to instruct the jury, that if they found that the article complained

of as libelous was not composed and published, or procured to be composed and published by the defendants *as an entirety*, as charged by the plaintiff, then their verdict should be for the defendants. This was rejected, and the defendants excepted. The court, in our opinion, was clearly right in rejecting this prayer. The proposition involved has been disposed of in what we have already said in regard to the main question of publication, and in considering the questions presented by the instructions granted at the instance of the plaintiff. *Parker v. Prescott, supra.*

The defendants set up the defense of privileged communication, and by their thirteenth prayer they requested the court to instruct the jury "that the letter of February 13, 1894, signed John Leetch, general manager, is a privileged communication, and before they could find a verdict against the defendants they must find the existence of malice against the plaintiff—that is, an intent to injure the plaintiff—as the motive of the defendant or defendants in writing such letter, and their verdict must be in favor of any and all the defendants in whom no malice or intent to injure the plaintiff was shown to exist at the time of the writing of said letter." This application for instruction was rejected, and the defendants excepted; and this ruling of the court is assigned as error.

This request to declare the letter of the 13th of February, 1894, a privileged communication, had nothing, either of law or fact, to support it. In the first place, that letter is not the libel declared on; it is only a part of the evidence to show the authority, aid and assistance furnished for composing and publishing the libel set out in the declaration. In the next place, the occasion of the publication furnished no privilege to any of the parties. The writing complained of was not composed and published in pursuance of any right or duty, legal or moral, private or public, on the part of the defendants. The defendants were under no obligation to furnish the data or information requested by Brown to be published in the "Progressive Age;" or to enable him to compose and publish the libelous article complained of. By furnishing the data requested, knowing the purpose for which it was to be used, they incurred the responsibility for the act of Brown, to the extent of the authority, aid and assistance given. If, however, the letters written by Leetch to Brown, could be regarded as privileged as between themselves, they certainly could not furnish matter to be entitled to privilege that was intended to be published in a public journal or periodical. The privilege, if it were conceded to exist as to the letters of Leetch, could not extend to the publication of the contents or substance of those letters in a public journal or periodical, issued for circulation among the public generally. *Phil., Wilm. & Balto. R. Co. v. Quigley*, 21 How. 202. In such publication the libelous article would lose all the right to privilege which it might otherwise claim. Without the protection of privileged communication, the publication of a libel is a wrongful act, presumably injurious to the party to whom it relates, and in the absence of legal excuse gives a right of recovery irrespective of the intent of the defendant who published it; and this although he had reason to believe the statement

to be true, and was actuated by an honest or even commendable motive in making the publication. *Holmes v. Jones*, 147 N. Y. 59. The question of damages depends upon other considerations. It is clear, therefore, the court was right in rejecting the thirteenth prayer of the defendants.

There is a question raised in this court, by assignment of error, which was not raised or passed upon in the court below; and that is as to the sufficiency of the verdict of the jury. As we have already stated, the action was brought against five defendants, and they all pleaded jointly the general issue plea of not guilty. The verdict was rendered against three of the defendants, and there does not appear to have been any finding at all as to the other two. This was a defective verdict, and if a motion in arrest of judgment had been made, it would have been set aside. But there was no such motion made, and the defendants against whom the verdict was found were content to allow judgment on the verdict to be entered against them. After suffering judgment to be entered on the verdict without question, it is too late, now, in this court, to raise the question as to the validity of the verdict and judgment thereon. Every intendment must be made in support of the verdict and judgment. After judgment entered, it may be well presumed that the defendants who were not included in the verdict of guilty were intended to be found not guilty; as in the cases of *Gulf, etc., R. Co. v. James*, 73 Texas, 12, and *Lockwood v. Bartlett*, 7 N. Y. Supp. 481. Or, it might well be presumed, that on the plaintiff taking judgment against the three defendants found guilty on the general issue, that he, by implication and intendment, discharged the other defendants, by way of *nolle prosequi*, which could be entered as well after as before verdict, and even after judgment.

"In cases of tort against several defendants, though they all join in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi* as to some of them, and take judgment against the rest. The reason is said to be, that the action is in its nature *joint and several*; and, as the plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after the verdict against several, elect to take his damages against either of them." *Minor v. Mechanics' Bank*, 1 Pet. 46, 74; *Ward v. Taylor*, 1 Pa. St. 238. There can be no question of contribution as between the defendants, if that were supposed to be material.

Upon the whole case, we find no ground for reversal of the judgment, and the same must be affirmed; and it is so ordered.

Judgment affirmed.

WEDNESDAY, *December 9th*, A. D. 1896.

THE WASHINGTON GAS LIGHT COMPANY,
Charles B. Bailey, and John Leetch, Ap-
pellants,

vs.

THOMAS G. LANSDEN.

No. 583.

October Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

December 9, 1896.

THURSDAY, *December 17th*, A. D. 1896.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B.
BAILEY, and JOHN LEETCH, Appellants,

vs.

THOMAS G. LANSDEN.

No. 583.

On motion of Mr. W. D. Davidge, of counsel for the appellants in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving supersedeas bond in the sum of twenty thousand dollars.

94 In the Court of Appeals of the District of Columbia.

THE WASHINGTON GAS LIGHT COMPANY, CHARLES B.
BAILEY, and JOHN LEETCH, Appellants,

vs.

THOMAS G. LANSDEN, Appellee.

No. 583.

Know all men by these presents that we, Washington Gas Light Company, Charles B. Bailey, and John Leetch, as principals, and American Surety Company, as surety, are held and firmly bound unto Thomas G. Lansden, his heirs, executors, administrators, or assigns, in the full and just sum of twenty thousand (\$20,000), dollars, to be paid to the said Thomas G. Lansden, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors, or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named Washington Gas Light Company, Charles B. Bailey, and John Leetch have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment

rendered in the above-entitled suit, and a citation directed to the said Thomas G. Lansden, citing and admonishing him to be and appear in the Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof.

Now, the condition of this obligation is such that if the said Washington Gas Light Company, Charles B. Bailey, and John Leetch shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their
95 plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] WASHINGTON GAS LIGHT COMPANY.
JOHN R. McLEAN, *President*.

Attest: W. B. ORME, *Secretary*.

CHARLES B. BAILEY.
JOHN LEETCH.

[SEAL.]
[SEAL.]

Sealed and delivered in the presence of—

GEO. M. WHITWELL.

[SEAL.] AMERICAN SECURITY COMPANY,
By DAVID B. SICKELS, *2d Vice-president*.

Attest: CORTLANDT S. VAN RENSSELAER, *Attorney*.

Approved the 24th day of December, 1896, to operate as a super-
seedeas bond.

R. H. ALVEY,
Chief Justice, Court of Appeals, D. C.

96 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 21st day of December, 1896, before me personally appeared David B. Sickles, 2d vice-president of the American Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the 2d vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and that he signed said instrument as 2d vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893; and the said David B. Sickles further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said company; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto

subscribed by the like order of the said board of trustees and in the presence of him, the said David B. Sickels, 2d vice-president.

[SEAL OF NOTARY PUBLIC.]

WM. E. MINER,
Notary Public, No. 175, New York Co.

Cert's filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, and Rockland co's.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed, such guarantee, bonds, and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

CITY AND COUNTY OF NEW YORK, ss:

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 21st day of December, 1896.

[Seal of American Security Company.]

CORTLANDT S. VAN RENSSELAER, *Attorney.*

28.431. C. R. F.

97 American Surety Company of New York.

General offices, 100 Broadway. Incorporated April 14, 1884.

Financial Statement, December 31, 1895.

Resources.

Real estate and im-		
provements	\$3,152,175 52	
Less payables	100,000 00	
	<hr/>	\$3,052,175 52
United States registered bonds	445,000 00	
Other stocks and bonds.....	662,526 25	
First liens and mortgages owned ..	323,909 99	
Mortgage loans and bills receivable.	115,623 76	
Accrued interest and dividends....	42,444 89	
Cash in banks and offices.....	84,407 44	
Premiums in course of collection ..	149,840 06	
	<hr/>	\$4,875,927 91

Liabilities.

Capital stock.....	\$2,500,000 00	
Surplus	1,000,000 00	
Undivided profits.....	568,522 74	
Premium-reserve requirement.....	568,999 06	
Claims in process of adjustment...	224,269 09	
Collateral and trust funds ...	14,137 02	
	<hr/>	\$4,875,927 91

98 CITY AND COUNTY OF NEW YORK, ss.:

Geo. L. Holmes, being duly sworn, deposes and says that he is the assistant secretary of the American Surety Company of New York, and that the foregoing is a true and correct statement of the financial condition of said surety company as of December 31, 1895, to the best of his knowledge and belief.

GEO. L. HOLMES.

Sworn to before me this 21st day of December, 1896.

[SEAL.]

WM. E. MINER,

Notary Public, New York County.

Endorsed: No. 583. Washington Gas Light Co. *et al.* vs. Thomas G. Lansden. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 26, 1896. Robert Willett, clerk.

99 UNITED STATES OF AMERICA, ss.:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, be-

fore you or some of you, between The Washington Gas Light Company, Charles B. Bailey, and John Leetch, appellants, and Thomas G. Lansden, appellee, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of December, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,

Clerk of the Court of Appeals of the District of Columbia.

100 UNITED STATES OF AMERICA, 88:

To Thomas G. Lansden, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Washington Gas Light Company, Charles B. Bailey, and John Leetch are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of December, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,

*Chief Justice of the Court of Appeals of the
District of Columbia.*

Service accepted December 26th, 1896.

J. J. DARLINGTON.

J. A. J.

[Endorsed :] Court of Appeals, District of Columbia. Filed Dec. 26, 1896. Robert Willett, clerk.

101 Court of Appeals of the District of Columbia.

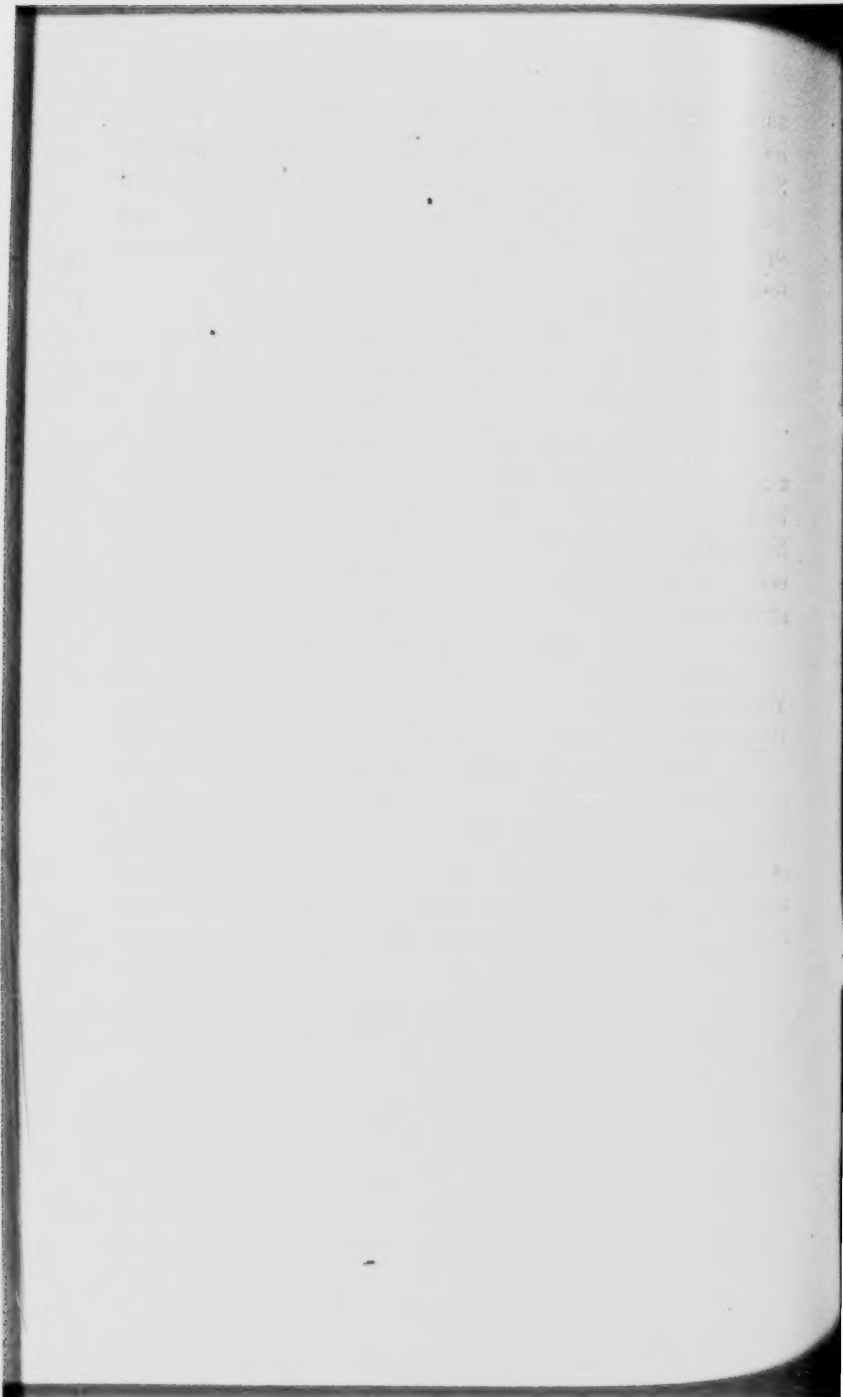
I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages, numbered from 1 to 100, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Washington Gas Light Company, Charles B. Bailey, and John Leetch, appellants, *vs.* Thomas G. Lansden, No. 583, October term, 1896, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of December, A. D. 1896.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover : Case No. 16,459. District of Columbia Court of Appeals. Term No., 680. The Washington Gas Light Company, Charles B. Bailey, and John Leetch, plaintiffs in error, *vs.* Thomas G. Lansden. Filed December 29th, 1896.



No. 282. 43.

Brief of Davidge & Perry for
P. E.

APR 25 1898
JAMES H. MCKENNA
CL

Filed April 25, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 282.

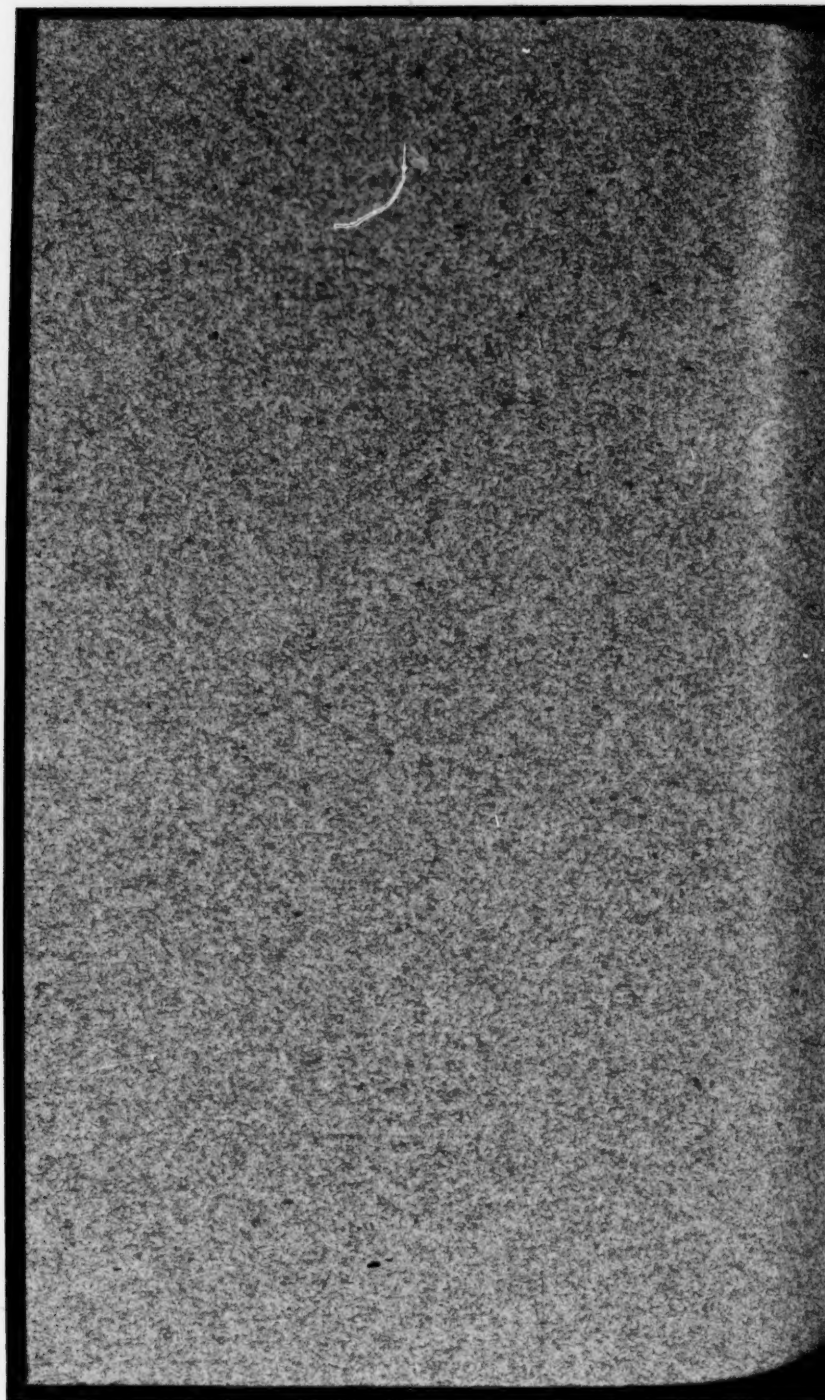
THE WASHINGTON GAS LIGHT COMPANY,
CHARLES B. BAILEY AND JOHN LEETCH,
PLAINTIFFS IN ERROR.

vs.

THOMAS G. LANSDEN.

BRIEF OF PLAINTIFFS IN ERROR.

W. D. DAVIDGE,
R. ROSS PERRY,
Attorneys for Plaintiffs in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 282.

THE WASHINGTON GAS LIGHT COMPANY,
CHARLES B. BAILEY AND JOHN LEETCH,
PLAINTIFFS IN ERROR.

vs.

THOMAS G. LANSDEN.

STATEMENT.

This is an action for libel against the Washington Gas Light Company, John R. McLean, its president, Charles B. Bailey, its secretary, William B. Orme, its assistant secretary, and John Leetch, its superintendent.

The declaration charges that the defendants did "compose and publish and cause and procure to be composed and published" a certain libel set out at record pages 3, 4, 5 and 6. Plea of all the defendants not guilty and issue joined upon the plea (R. 7).

The verdict was for the plaintiff against the company, Bailey and Leetch (R. 8). There was no finding as to the other defendants.

Lansden, the plaintiff, was in the employ of the defendant company, as superintendent, from the 1st of November, 1886, until the 1st of June, 1893. He was a gas engineer; that is, as he defines the term (R. 23); a man who constructs and

manufactures gas works, and manufactures gas, and had been engaged in that profession for about thirty years. Before he was employed by the defendant company he was superintendent of the St. Louis Gas Works for eleven years. He belonged to the gas association, and was an expert in respect of the gas industry.

In January, 1893, action having been taken by the House of Representatives towards reducing the price of gas supplied by the company to the Government buildings in the District of Columbia to seventy-five cents per one thousand feet, the plaintiff was called on by John R. McLean, the president of the company, to make a written statement of what he could testify to, if called as a witness before the committee of the House.

Thereupon the plaintiff prepared, in his own handwriting, and delivered to McLean the following statement (R. 24, 36, 37):

Name: _____.

Occupation: _____.

How long have you been connected with the Washington Gas L't Co.?

Six and a half years.

Have you had other experience with gas Co.'s before coming to Washington?

For the ten years previous to coming to Washington I was eng'r & sup't of the St. Louis Gas Co., and for the twelve years previous to that I was building and running gas works throughout the West.

Are you familiar with the prices and quality of gas furnished by the leading cities of this country?

I am. I have visited the works of every city of size throughout the United States.

How do the works and methods of manufacturing gas at the Washington Gas L't Co. compare with works and methods of other cities?

They are equal to any and superior to many of those of other cities.

How do the prices charged by the Washington

Gas L't Co. compare with prices charged by the companies of other cities?

They are as low as any city where material for making gas is of like cost. Some of the cities get material for less than one-half the cost it is to our company.

Name some of the cities so favored.

Cincinnati and Cleveland, Ohio.

What city or cities furnish the highest C. P. ?

New York city, I think, furnishes about as good gas as is made in this country.

How will the gas supplied by your company compare with New York ?

I think we make as good gas as is made in any city. The methods of testing in Washington are different to other cities.

What is the price charged for gas by the leading cities of this country ?

New York charges.....	125
Philadelphia.....	150
Baltimore.....	125
Chicago.....	125
St. Louis.....	125
Boston.....	125
Washington.....	125

What is the material used for making gas in Washington ?

Coal and naptha oil.

What is the material used in other cities ?

New York, principally oil; some coal.

Philadelphia, oil & coal.

Baltimore, oil; Chicago, oil; St. Louis, coal and oil; Boston, oil mostly.

Has there been much complaint of your gas at your office recently ?

There has been complaint within the past few weeks during the cold weather of about one-half per cent. of our consumers. What they generally call bad gas is a want of pressure occasioned by the excessive cold weather.

What effect does the cold weather have on the gas ?

All illuminating gas, by whatever *known method* made, contains an aqueous vapor. When the pipes are exposed by crossing areas or otherwise, this vapor forms a fine frost on the inside of the pipes, which checks the flow of gas. A great many of our meters are exposed, as we have no inspection in Washington. The gas-fitters usually set the meters where they please.

All other cities have inspection of gas-fitting?

Washington is the only city where gas is used that has no inspection.

Do you receive daily notice of the quality of your gas from the United States inspector?

Yes.

Do these reports show you are complying with the law?

They show we are doing much better than the law requires. They sometimes show four-candle power over the standard, and for the past two or three years the average has been over two candles above the requirement.

Do you make any difference in the quality of the gas furnished during the session of Congress to that furnished when Congress is not in session?

We never have, but this winter, since Nov. 1st, our new management instructed me to make the best gas I could. We have, since Nov. 1st, when our new plant was put in action, made a better candle power than before, but this is purely a business matter for competing with electricity; we will not reduce the candle power when Congress adjourns.

Was there not complaint of your gas before Congress met this winter?

About the 1st of Nov., when we started our new plant at 26th & G Sts., N. W., we had, for a few days, some trouble. As the process was new, it took our men a few days to learn how to handle it, yet at no time did we go below the standard.

What does gas cost to manufacture at your works?

It costs us 48.38 per thousand in the holder and 40.09 " " for distribution.

Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

I know of but one way that a small amount might be saved. That is by reducing the salaries of our clerks and the price paid to our laborers; this we would not like to do.

How does the prices charged for lamps in Washington compare with other cities?

They are as low as any where the same amount of gas is used to the lamp and the same number of hours lighted in the year, when the company lights and cleans the lamps.

This statement was by McLean delivered to the defendant Bailey, the secretary of the company, for safe keeping (R. 42, 37).

The plaintiff was never called as a witness in 1893, nor does it appear that in that year any investigation took place before any committee touching the proposed reduction.

On the 1st day of June, 1893, the plaintiff left the employment of the company, and his duties as superintendent devolved on the defendant, John Leetch. The parting of the plaintiff was, to say the least, not a happy one, and several witnesses testify that the plaintiff, at the time of his resignation promised to meet the company "on the Hill" (meaning at the Capitol) the next winter, and then to work in the interest of the consumers, instead of the company (R. 59, 60, 61, 62). When the next winter came and in January, 1894, an investigation was set on foot in Congress in respect of the reduction of the price of gas to one dollar, instead of one dollar and twenty-five cents per thousand feet, the existing price.

The plaintiff, true to his word, appeared as a witness, and testified as follows:

Lansden in 1894.

Q. From your knowledge of the business and condition of affairs here, at what price could the gas company sell gas and pay a reasonable profit?

A. Well, sir, I think they can sell it at \$1 a thou-

sand. That is the reason I came before this committee. I am a gas consumer to-day, and I have had a good deal of experience, and I think it to the interest of the gas company to stop all these troubles, and they should put the price down to \$1 a thousand, and stop the annoyance. They should make good gas and put the price down to \$1.

Q. Will it stop the complaints?

A. Not entirely. You never will do that.

Q. What is the result of your experience, if you are able to submit a statement to the committee—leaving out of consideration the interest on investment and plant, etc., what is the actual cost per thousand for the production of gas in the city of Washington?

A. Do you mean what it can be made for?

Q. What did you make it for under your management?

A. Without counting interest, you mean?

Q. Without counting the interest on investment.

A. It can be put in the holder with the present modern machinery which the company has for about 32 cents, with the proportion they are making now of water gas and coal gas. I think it ought to be distributed for 20 to 22 cents a thousand.

Q. What is the next item of cost after putting it in the holder?

A. Distribution. After it is put in the holder it is drawn out by the consumer; and then there is the expense of inspectors taking the statements and running what we call the upper offices.

Q. What percentage of cost would that be?

A. I put that between 20 and 22 cents.

Q. That would make this cost 54 to 56 cents per thousand?

A. Yes, sir; I think so.

Q. That includes office expenses?

A. Then comes taxes and repairs, and I think it can be easily made inside of 70 cents, counting in repairs and taxes.

Q. Now, does that include everything except interest on investment?

A. Interest on investment comes in the shape of dividends, I consider.

By a comparison of this evidence of the witness with his written statement delivered to McLean and above set out, the most glaring discrepancies will be apparent.

The cost of manufacture, by which is meant the expense necessary to manufacture and put the manufactured fluid in the large gas-holders, is reduced 18.38 cents per thousand, and the cost of distribution—that is, the expense of whatever kind incurred down to the delivery of the manufactured article to the consumer—is reduced from 40.09 to from 20 to 22 cents per thousand, and the total of both the cost of manufacture and that of distribution is reduced about 18½ cents per thousand feet.

The gas industry is a very large and important one, and the evidence of the plaintiff, published in the daily papers as it was, produced widespread astonishment and criticism among gas producers.

On the 12th day of February, 1894, E. C. Brown, the publisher and editor of a newspaper published in New York, and devoted especially to the gas industry, wrote the following letter to the defendant Leech (R. 10):

E. C. Brown, publisher. Established 1883.

Office of Progressive Age. Gas, electricity, water.

NEW YORK, *February 12, 1894.*

Washington Gas Light Co., Washington, D. C.

GENTLEMEN: I have watched with great interest the continued reports of the proceedings against your company, as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Was his statements correctly reported in the Washington Star of 3rd inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

Very truly yours,

E. C. BROWN.

The envelope containing the letter was as follows:

"The Progressive Age. Gas, electricity, water.
\$3.00 per year. 280 Broadway, New York. Semi-monthly.

New York, N. Y., JOHN LEETCH, *Gen'l Manager.*
Feb. 14, 5.30 p. m., *Washington Gas Light Co.*
1894. *Washington, D. C.*
Personal."

This letter was shown by Leetch to the defendant Bailey, who had the custody of the written statement of the plaintiff above mentioned, and who called the attention of Leetch to that statement and, at the instance of the latter, gave it to him, and he went off with it to his room (R. 42).

On the same day, the 13th of February, 1894, Leetch answered Brown's letter as follows:

WASHINGTON, D. C., *Feb. 13, 1894.*

E. C. Brown, Esq., publisher *Progressive Age*, 280 Broadway, N. Y.

DEAR SIR: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former sup't of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for seventy cents, and to the consumer for \$1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington and made the following replies:

"Q. What does gas cost to manufacture at your works?

A. It costs us 48.38c per thousand in the holder and 40.09c. per thousand for distribution.

Q. Can you in any way reduce the cost of gas in the manufacturing, so your company could sell for less to the consumer?

A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

Q. How do the prices charged for lamps in Washington compare with other cities?

A. They are as low as anywhere the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps."

You will notice that he makes a difference of about $18\frac{1}{2}$ cents per 1,000 feet then as compared with his statement now, although he must know that the material used, coal, and labor is just the same now as then, except price of naphtha, which is higher.

You can try to reconcile the two statements.

Very truly yours,

JOHN LEETCH,
General Manager.

The questions and answers contained in this letter are a literal copy of those in the written statement of the plaintiff.

On the 14th and again on the 19th of February, 1894, Brown wrote to Leetch requesting a copy of the evidence of the plaintiff given at the investigation then pending, and intimating an intention to publish the statements of the plaintiff on that as well as the former occasion.

A copy of the evidence of the plaintiff was accordingly sent on the 20th of February, 1894 (R. 49, 50).

On the 1st of March, 1894, the alleged libel, set out in the declaration, was published in the *Progressive Age* (R. 14, 15, 16 and 17).

On examination of this paper it will be found that so much of the letter of Leetch of the 13th of February, 1894, as asserts that the plaintiff was "called upon" in February,

1893, to answer certain questions bearing upon the reduction of gas, with the questions and answers on that occasion, is reproduced. (See Record, last line of pages 15 and 16 down to "Lansden in 1894.") The contents of the letter thus reproduced by Brown are the only evidence connecting the defendants in any manner with the libel as alleged in the declaration, and by the ruling of the court below are made the basis of their responsibility.

Even conceding, however, that the contents of the letter were a libel they certainly were not the libel set out in the declaration. The libel declared on is another and wholly different paper in words, substance and effect. It is besides set out "as of the tenor following" (R. 3) and in inverted commas, or in other words descriptively, and the plaintiff could only recover by proving exactly the paper described.

The court ruled otherwise, under the demurrer to the plaintiff's evidence (R. 36) and in response to the prayers of the defendants (R. 66, 67) and the ruling was excepted to (Id.) and is here assigned as error.

The declaration charges that the defendants composed and published and caused and procured to be composed and published the alleged libel.

In the absence of any evidence of the first part of the charge the only issue before the jury was whether the defendants or any of them caused or procured to be composed and published the alleged libel.

This plain and simple issue is the very thing not submitted to the jury, but in lieu of it the court ruled (R. 64, 65) that if Leetch at the time of writing and sending the letter knew that Brown was the publisher of the *Progressive Age*, and that said paper was devoted to the interests of and had an extensive circulation among gas manufacturers, then it was for the jury to determine whether the letter was written and sent for *the purpose of supplying the data* it contains for a publication in the *Progressive Age* or

with the *knowledge* that it was *likely* to be or *probably* would be used for such purpose.

The ruling then proceeds further to declare that if the purpose of Leetch was to supply data for a publication (not *the* publication) or if he knew that the letter would be "likely" to be used or "probably" would be used for a publication (not *the* publication), then if sent maliciously, for such purpose or with such knowledge, responsibility would, by operation of law, attach not only for the publication by Brown of the contents of the letter, but for all other portions of the alleged libel either "suggested" or "inspired" by the letter.

This ruling, given at the instance of the counsel of the plaintiff, was supplemented by the court declaring, of its own motion (R. 66), that in sending the letter it was not necessary that Leetch should have acted from hatred or ill-will—in other words from malice in fact—but that malice in law would suffice, and that such malice could be inferred from sending—

"any false or libellous matter about the plaintiff to said Brown, knowing it to be false, with the *intent* or *consent* that the same should be published."

The record shows that when the letter was sent by Leetch he neither knew nor had reason to know that the statement on file, in the handwriting of the plaintiff, was not in fact what on its face it purported to be.

Thus the ruling of the court was, in substance, that the sending of the letter with the alleged purpose, or, if not with such purpose, with the alleged knowledge, in law made the sender liable for having caused to be composed and published so much of the alleged libel as was "suggested or inspired" by the letter.

This ruling utterly ignored any *request* on the part of the sender to compose and publish or any *intent* on his part that the contents should be composed and published, and

in short the relation of the sender to the alleged libel as the *proximate* cause of its publication. It broadly assumed that sending the so-called data of itself made the sender responsible for whatever the data might suggest to or inspire in Brown, and for whatever the latter, acting as a free agent and of his own independent volition, might compose and publish.

It also ignored the great fact that the so-called data were true, or, if not true, that Leetch had every reason to believe them to be true, written as they were by the plaintiff himself.

This ruling the defendants sought by a series of prayers to correct or modify, but without success (in prayers 7, 8 and 9, and exceptions, R. 67).

The above ruling was made in respect of the defendants Leetch and the company, but was reiterated with even more injustice in respect of the defendant Bailey (R. 65, plaintiff's second prayer). As stated above, Bailey gave the written statement of the plaintiff to Leetch. The plaintiff claimed that the cost of manufacture and distribution, represented by the figures in the statement, was taken by Bailey from the books of the company and given to him, and, without any evidence, was known to Bailey not to be the estimate of the plaintiff. The court ruled that if Bailey so knew and communicated the figures to Leetch as the estimate of the plaintiff, and intended them to be communicated to Brown for publication, then the jury might find that Bailey, as well as Leetch and the company, caused and procured to be composed and published the alleged libel. This ruling, apart from the absence of evidence to sustain it, is obnoxious to the same objections as the previous ruling.

Both rulings are assigned as error.

At the trial the court admitted, against the repeated objections of the defendants, evidence as to the financial condition of the company, its earning capacity, its dividends of ten per cent. per annum from 1890 to the time of the trial and large extra dividends in cash and certificates. All the

evidence in the case is certified by the bill of exceptions (R. 64). The attention of the court is specially asked to the rulings and colloquies (R. 34, 35, 36). The sufficiency of the company to pay the full amount of damages claimed, \$50,000, was admitted by its counsel. But, said the court:

"I do not think that the admission of a fact that it is able to respond to damages amounts to anything. The object of this evidence is, as Mr. Darlington says, to furnish the jury the basis upon which they may calculate exemplary damages, if they are entitled to exemplary damages as is claimed. If the jury are going to give exemplary damages they might give much larger damages against a very wealthy person than they would against a person of ordinary circumstances."

And again—

"If you admit that if they are entitled to a verdict at all they are entitled to \$50,000, that does away with the necessity of the evidence; otherwise I think it would be admissible."

This evidence was given at the close of the plaintiff's case. The court will see by an examination of all the evidence that there was not the slightest ground for exemplary damages. Indeed, they were not subsequently claimed by the plaintiff (R. 66). And the court ruled that compensation was the measure of damages (R. 69, 76).

The effect of the introduction of this evidence must have been to prejudice the jury and inflame their minds against the corporation, and that it influenced them is shown by the amount of the verdict.

The court never expressly withdrew the evidence, even if that remedy would have sufficed to correct the mischief done by its improper admission. Giving the instruction as to compensatory damages and that too, with the qualification that the plaintiff did not "contend for" or "claim" more was wholly insufficient (R. 76).

This also is assigned as error.

The demurrer to the evidence of the plaintiff (R. 36) and the tenth prayer of the defendants refused by the court (R. 69), presented the question of the privileged character of the letter of the 13th of February, 1894 (R. 12, 13). This letter also is the foundation of the first and second instructions given at the instance of the plaintiff and in which the above question is entirely overlooked by the court (R. 65, 66).

The letter was not volunteered, if indeed that could make any difference, but was an honest answer to the letter of Brown, above set out, dated the day before, seeking information on a subject in which he had an interest. The evidence of the plaintiff before the committee concerned all interested in the production of gas here and elsewhere, and his standing and experience gave more than ordinary weight to his evidence. It was of vital importance to all gas producers and the newspaper devoted to their interests to know whether the plaintiff had testified, as reported, that gas could be delivered to the consumer for twenty-five cents per thousand feet less than the current rate in the different cities of the country, and if so, whether his evidence was worthy of belief or the outcome of prejudice and spite.

The letter was therefore a privileged communication if written in good faith, and good faith was to be presumed unless express malice was shown.

The uncontradicted evidence is that Leetch when he wrote the letter, believed that the statement on file in the handwriting of the plaintiff, contained his estimate in 1893 of the cost of manufacture and that of distribution (R. 53). For what Leetch wrote he had the written warrant of the plaintiff himself (R. 53, 54), and (R. 28) the further statement of plaintiff that he knew of but one way the cost could be reduced and that was by reducing salaries and wages. He had also the warrant of what he was told by Bailey (R. 42).

The plaintiff, in his evidence (R. 23), attempted to weaken the force of his written statement by asserting that the figures as to the cost of manufacture and that of distribution were not his own, but were given by McLean to him, and by him written in the statement. McLean contradicts this (R. 36).

The plaintiff admits he could closely approximate the cost of manufacture, being in charge of that department, but utterly fails to explain the wide difference in respect of manufacture between the statement and his evidence in 1894, and, as regards distribution, it is inconceivable that with his knowledge and long experience he could not closely approximate that also. He knew as to both as much in 1893 as in 1894.

He also wholly fails to explain other passages in the statement utterly at war with his evidence in 1894.

But it is unnecessary to show more fully the impotence of this and other devices to get rid of the statement.

The answer to whatever is set up to avoid the statement is that *Leetch is to be judged by what was presented to his mind when he wrote the letter, and not by what the plaintiff asserted in his own behalf more than two years afterwards.*

The question to be tried was not whether the statements in the letter were true, but whether the writer believed them to be true. Even if it be assumed, contrary to the evidence, that McLean or Bailey knew the estimates in the written statements were not those of the plaintiff, there can be no pretense that *either ever communicated that information to Leetch, the writer of the letter.*

The letter was *prima facie* privileged, and even if its contents were not true, that fact bore only upon the subject of defendant's malice.

The action of the court in respect of privileged communication is assigned as error.

Another ruling of the court assigned as error is the submission to the jury of the question whether Leetch, when he

wrote and sent the letter of the 13th of February, 1894, was acting within his authority, express or implied, or as it is very vaguely put by the court "in the course of his duties," as general manager. If he was so acting the court ruled the company was responsible not only for the letter but for whatever in the alleged libel was "suggested" or "inspired" by the letter.

There was no evidence in the case that the letter of Brown dated the 12th of February, 1894, and addressed to the "Washington Gas Light Company, Washington, D. C., (R. 10), the envelope being directed to 'John Leetch, general manager, Washington Gas Light Company, Washington, D. C.'" (R. 51), was ever received by the company, or that any express authority was ever given to Leetch or anybody else to answer it or that the answer of Leetch was ever ratified or adopted by the company or even known to it.

Nothing of the sort is pretended, but the contention is that Leetch was acting in the exercise of his authority as general manager, and that writing and sending the letter was within such authority (R. 54, 55, 68). This brings us to the occasion of the letter. The company was engaged in a controversy before the committee involving the reduction by Congress of the price of gas. The plaintiff had, on February 3, 1894 (R. 10), been examined as a witness, and his evidence had been circulated by the newspapers. Then, on February 12, Brown wrote his letter expressing surprise at the character and extent of the plaintiff's evidence, and asking whether the evidence was correctly reported, and what was the object of the plaintiff's attack. Action upon such a letter relating exclusively to the evidence of the plaintiff before a Congressional committee, and his object in assailing the corporation, belonged to the Board charged with the government of the affairs of the corporation. Such action involved the exercise of discretionary power in a matter very exceptional in character. The subject of the letter was not the cost of gas, but *the evidence of*

the witness. The letter was addressed to the company, and there can be no pretense that the Board ever delegated to Leetch authority to answer it. There can also be no pretense that the authority to answer was incident to his office. His duties related to the manufacture of gas, the care of the gas works, and doing what he was directed to do. His duties were large, but purely subordinate and ministerial, and certainly did not embrace the charge of the Congressional investigation or the authority to determine whether any answer, or if any, what answer, to the letter was required by the interests of the company. He swears he regarded the letter as personal, and answered it as an act of courtesy.

In the following argument every particle of evidence bearing upon his authority is set out for the convenience of the court.

The last question presented by this appeal is the form of the verdict. The verdict is against three only of five defendants. The issue submitted to the jury involved all the defendants—five in number. As part only of the issue has been found by the jury the verdict was void, and the judgment on that verdict should be reversed.

ASSIGNMENT OF ERRORS.

The court erred:

1. In refusing to direct a verdict for the defendants on the ground that the evidence did not tend to show that they caused the publication of the libel described and set out in the declaration, but, at best, only so much of said libel as is contained in the letter of the 13th of February, 1894.

2. In ruling to the contrary, in respect of the company and Leetch, that the jury might find from the evidence that said letter was sent by Leetch to Brown with the purpose of furnishing to the latter data for a publication (not *the* publi-

cation) or with the knowledge that it was "likely" or "probable" the letter would be used for a publication (not *the* publication), and that if the letter was sent for such purpose or with such knowledge the said defendants were liable for *any* publication which Brown might make, or for any part of such publication, "suggested" or "inspired" by the letter; or, in other words, that the liability of said defendants did not depend upon their causing by request or otherwise the alleged libelous publication to be made, but that if they did not so cause they were still liable by reason of sending the data for any publication or *any part* thereof which Brown, an independent agent, might make if "suggested" or "inspired" by the letter.

3. In further ruling that the above facts which would make the company and Leetch liable would also make Bailey liable for the alleged libelous publication, or any part thereof, suggested or inspired by the letter, if, when shown by Leetch the letter of Brown of February 12, 1894, he, Bailey, knowing that the figures in Lansden's statement as to the cost of the manufacture and distribution of gas did not represent Lansden's own estimate, but were taken from the books of the company, delivered said statement to Leetch for the purpose of enabling him to communicate it to Brown as Lansden's own statement and as tending to impeach his evidence in 1894.

4. In overruling the objection that there was a variance between the libel alleged and described in the declaration and the evidence.

5. In not submitting to the jury the question whether the defendants caused or procured.

6. In submitting to the jury the question of the responsibility of the defendant, Bailey, without any evidence to support such responsibility.

7. In holding that responsibility attached to the defendants for what the jury might find was "suggested" or "inspired" by the letter of the 13th of February, 1894.

8. In admitting illegal evidence as to the financial condition of one of the defendants and failing to withdraw and caution the jury against the same.

9. In ignoring the question of privileged communication.

10. In submitting to the jury the question whether Leetch, in respect to the subject of the letter of the 13th of February, 1894, had authority to bind the company.

11. In refusing to direct a verdict in favor of each of the defendants.

12. In rendering judgment on the verdict which disposed only in part of the issue submitted to the jury.

13. For divers other errors apparent on the face of the record.

POINTS AND ARGUMENT.

1st, 2d, 3d, 5th and 11th Errors Assigned.

1. The declaration charges that the defendants did "compose and publish and cause and procure to be composed and published" the libel described and set out according to its "tenor" (R. 2, 3, 4, 5, 6). To enable the plaintiff to recover it was necessary for him to maintain this allegation. It is not controverted by the plaintiff that the alleged libel was in fact composed and published by Brown, the editor of the *Progressive Age*, a newspaper published in the city of New York. His contention, however, is that the defendants, or some of them, caused or procured the publication of the libel, and hence are liable.

On behalf of the defendants it is conceded that one may be liable for the publication of a libel when composed by another, and further that every one who requests or procures, by words or acts, another to publish is answerable as though he had published himself. Such liability, however, is for the specific libel published and not for any other libel.

Thus the question in the present case is whether the plaintiffs in error caused or procured the publication of the libel described in the declaration.

This would seem to be a very simple question, but simple as it is it has never been tried; on the contrary, other and essentially different issues have been, by the erroneous rulings of the court, substituted in its stead.

At the trial it was claimed that the defendant company was liable for the libel because its agent, Leetch, acting in the line of his duty, wrote and sent to Brown the letter of the 13th of February, 1894, in reply to his letter of the 12th of the same month (R. 10, 12).

It was also claimed that Leetch was individually liable by reason of the same letter.

And it was further claimed that Bailey was liable, because, knowing that the estimate of the cost of distribution in Lansden's statement was taken by him from the books of the company, he gave the statement to Leetch as containing the estimate of Lansden himself and thereby enabled Leetch to send it in his letter to Brown as such estimate.

Thus the letter of the 13th of February, 1894, was the sole predicate of liability. Leetch was liable because he wrote and sent it, the company because it was responsible for what Leetch did, and Bailey because he gave the estimate to Leetch as that of Lansden, knowing to the contrary, and thereby aiding in the transmission of that part of the statement to Brown, although the evidence shows that Bailey did not even know what use Leetch proposed to make of the statement.

It is not pretended that the defendants below or any one of them knew or had seen or heard of Brown until the receipt of his letter by Leetch, or knew or had reason to know what use, if any, he could make of the contents of the letter. Knowing, then, the only pretense of authority or agency of Brown to act in behalf of the defendants below in composing and publishing the alleged libel, there surely ought

to be little difficulty in determining whether such authority or agency in fact existed and if it did to what extent.

It is submitted that in order to render any of the defendants below liable for causing or procuring the composition or publication of the alleged libel it was in law incumbent upon the plaintiff to prove that they did in fact cause or procure as charged. The libel in question was, it is conceded, composed and published by Brown. If, however, in what he did he acted at the request directly or indirectly of the defendants, or by their authority, they also are liable. But the basis of their liability is that Brown was their agent, and, more than that, their agent in respect of the specific act charged. And where it is sought to charge any party for the act of another, agency or authority on the part of the former in respect of the specific act complained of must be as clearly shown as is required when it is sought to make a party liable for his own act instead of that of another. There would be little security for the rights of person or property if this were not so. Indeed, the foundation of liability is that the evil intention of a wrongdoer finds expression through the act of another instead of his own act. And hence he is properly held responsible. We cite a single illustration, *Parkes vs. Prescott*, L. R. 4 Exch. 169, cited with approval in the opinion of the learned court below, and which, if followed, must have led to a conclusion diametrically opposite to that reached by the court.

In that case the alleged libel consisted of a report of the proceedings of a meeting of the board of guardians of the poor. One of the defendants (*Prescott*) was chairman of the meeting and another (*Ellis*) a member of the board. Discussion took place at the meeting in relation to the treatment by the plaintiff of his daughter, who, dependent upon public charity, was an inmate of the workhouse. The conduct of the plaintiff was denounced in highly defamatory remarks. Reporters were present and a report of the proceedings was published. At the trial evidence

was given to connect the defendants with the publication. The defendant Ellis said he hoped the local press would take notice of this very scandalous case, and requested the chairman to give an outline of it. This was done by several members of the board and the chief facts taken down by the reporters and afterwards published. The defendant Prescott also said in the course of his statement relative to the case, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." On which Ellis said, "And so do I." The defendant Prescott also said that he hoped publicity would be given to the latter. It was proved by the reporters that the reports published were a *correct summary* of what took place. The judge who tried the cause held the evidence of publication insufficient and directed a verdict for the defendants. The case then went to the Exchequer Chamber. A majority of the court, which consisted of five, held that to render the defendants liable there must have been evidence—

"first, of a request to publish the proceedings of the meeting relating to the plaintiff's conduct, and secondly, that the report contained a *correct account* of the proceedings as the defendants meant it should appear" (p. 177),

and being of the opinion that there was such evidence, reversed the ruling below. The minority went further, in respect of the second point, Byles, J., holding that the request to publish, conceded to be necessary, must have been a request to publish the very words of the libel alleged in the declaration, and Miller, J.—

"that to support the allegation that the defendants caused to be printed and published the libel set out in the declaration there ought to have been evidence of a communication, either verbal or written, of the entire substance of the libel to the reporter as the libel to be published, or that before or after the publication thereof the defendants saw and approved of the particular libel" (p. 186).

There was no difference of opinion as to the necessity of a request to publish, nor was it intimated that a hope or wish, if not effectuated by a request, would make the actual publisher the agent as to the specific act of the party charged. The majority held in terms that although the published libel need not be in the exact words of the request, it must adhere to it in "sense and substance"—as in a civil suit the principal is not bound beyond the authority given to his agent.

Turning now to the present case, it was necessary for the plaintiff to prove, first, a request to publish, and second, to publish, if not in the very words, at least, in "sense and substance" the alleged libel. These postulates of the right to recover were utterly disregarded by the court below, both as to the right to recover against Leetch and the company (plaintiff's first prayer, R. 64, 72) and also as to Bailey (plaintiff's second prayer, R. 65, 73).

As to Leetch and the Company.

The court ruled that if Leetch wrote and sent the letter of the 13th of February to Brown and at that time was the general manager of the company, and in the course of his duties as such, wrote and sent the letter, and if at that time Brown was, and was known to Leetch to be, the publisher of the "Progressive Age," a paper devoted to the interests of gas manufacturers throughout the country and having an extensive circulation among them, then "it was for the jury to determine from all the facts and circumstances as disclosed by the evidence" (there were none except the letter itself), whether the said letter was written and sent *for the purpose of supplying data which it contained for a* (that is any) publication in the Progressive Age, or with the knowledge that it was "likely" to be or "probably" would be used for such purpose, and if the jury believe that the letter was sent maliciously *for such purpose* or *with such knowledge* and that the alleged libel was afterwards published in the Pro-

gressive Age, then to the extent to which the jury shall find the contents of the libel were "suggested" or "inspired" by the letter, the defendants are responsible for the publication of the libel.

It is submitted that this instruction is in every essential erroneous

1. *The charge was causing or procuring.*

The fundamental question was whether the defendants caused or procured—a very simple question to be tried by the jury if there had been evidence to sustain it. And yet this question was not even submitted to the jury. Instead of submitting it, the jury were instructed that if Leetch wrote and sent the letter for the purpose of supplying data for any publication, whatever its character, or with the knowledge that the letter was "likely" to be or "probably" would be used for such purpose, the defendants were liable for any "suggestion" or "inspiration" of the letter.

Thus, causing or procuring, ceased to be a fact triable by the jury, but was made an inference of law from writing and sending the letter for the purpose of supplying data for any publication or with the knowledge that it was "likely" or "probable" that Brown would use the contents for any publication; in lieu of the fact that lay at the foundation of the right of the plaintiff to recover, that is, causing or procuring, the defendants were made liable for a "purpose" or knowledge of what it was "likely" or "probable" Brown would do, although in fact they did not cause or procure the publication. The instruction utterly ignored the patent fact that a man may supply data, or have the knowledge, mentioned in the instruction and yet leave the question whether there shall be any publication or if any what, to the uncontrolled will and discretion of the other party.

The issue was whether the defendants were liable for the act of Brown. They could only be liable if Brown acted at their request, manifested by words or conduct, or in other words as their agent, and then only to the extent of the

agency. Was there any such request? The instruction assumes there was none and yet in its absence declares the plaintiff may recover. Such absence can only be accounted for by the fact that there was no evidence of a request and hence the plaintiff sought and was allowed to recover on other grounds.

The only defendant who held any communication with Brown of any sort was Leetch and he only by letter. If there was any request it must be sought in the correspondence set out in the Record (R. 10, 12, 49, 50.) It is too plain for argument that in none of the letters of Leetch does he request any publication. On the contrary he leaves Brown to act on his own judgment and responsibility. The utmost that can be said is that Leetch knew from the letters of Brown of February 14, 1894, and February 19, 1894, that the latter intended to publish the contradictory statements of Lansden, but that knowledge surely did not render Leetch and the company liable for any publication Brown might in the exercise of his own will and discretion subsequently compose and publish.

Even if there had been evidence that tended in any degree to show request, it was a fatal error to withdraw that question from the jury by substituting in lieu of it predicates of liability not its equivalent in law, logic, or common sense.

2. *The instruction having erroneously declared a process whereby a party might by operation of law cause and procure, although he did not in fact do so, then proceeds to commit an even greater error in respect of the thing caused or procured.*

The defendants were charged with causing or procuring a specific libel set out in the declaration according to its tenor (R. 3, 4, 5, 6). They were not charged with composing or publishing the letter of the 13th of February, 1894. The instruction declares that if the letter was written and sent to Brown to supply data for a publication, that is, any publication, or with knowledge that it was "likely" or

"probable" the contents would be used for any publication, the defendants were liable for the libel declared on to the extent to which its contents were suggested or inspired by the letter.

It is not easy to conceive a more dangerous doctrine than that announced by the instruction, and it is submitted that the law is exactly the reverse.

The charge is that the defendants caused and procured the libel declared on. The proof is that they wrote and sent the letter. The libel was composed and published by Brown. Then did the letter cause and procure such libel? Was Brown by the letter made the agent of the defendant for the publication of the libel declared on? Assume the letter to be libelous, yet the defendants were not sued for the libel contained in it. Are they liable for another and in form and substance a different libel? Certainly they are not, unless by the letter they authorized or requested Brown to publish such other and different libel. The real question is one of agency or authority.

It is true that in respect of crimes committed by an agent the principal may be responsible although the agent has departed from the authority given. But this is on grounds of public policy and in civil cases the rule is different and it is always competent to show that the authority given was not pursued, and hence the principal not liable. In *Parkes vs. Prescott*, *supra*, there was no difference of opinion on this point. Montague, J., speaking for the majority, said as stated above and also (p. 174):

"The man who requests another to make and publish an outline or summary of a speech, writing or proceedings must know that the words will be, to some extent, those of him who makes such summary or outline; and he must therefore be taken to constitute him an agent for the purpose and be answerable for the result, *subject always to the question whether the authority has been really followed.*"

And Byles, J., page 170:

"There is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not civilly liable for the acts of his agent unless the agent's authority be by the agent duly pursued, but the principal may be criminally liable though the agent may have deviated very widely from his authority or instructions. . . . It is true that a libel is a criminal act, but in this case the plaintiff does not proceed for the criminal act, but for the civil injury. . . . Besides, in misdemeanors, although all who procure, abet, assist or assent to, are principal misdemeanants, yet the judge may apportion and restrain the punishment to the real demerits of each delinquent. But in a civil action the object is damages, which cannot be apportioned among the defendants, but all who remain upon the record must be liable for the whole amount. . . ."

In the above case the libel consisted of a summary or condensed statement of the proceedings at the meeting, and witnesses testified to the correctness of the summary "in sense and substance."

Here the alleged libel is not only different in words, but quite as different in sense and substance. A new subject—that is, Lansden's St. Louis exploit—is introduced and treated so as to induce the belief that it was a disgraceful act of some sort and the subject of the letter; that is, the contradictory statements of Lansden in 1893 and 1894 is discussed in abusive and libelous expressions, in sense and substance different from anything contained in the letter.

It is true the questions and answers of Lansden contained in the letter written by himself in 1893 are republished and constitute part of the alleged libel, but they are a part only and there is no request to publish even them as already shown, but as to the residue of the alleged libel no candid

mind will assert that it is other than a publication made by Brown of his own motion for which he and he alone is responsible. This fact probably led to the novel doctrine of "suggestion" and "inspiration" contained in the prayer.

Identical in facts with the present case is that of *Cochran vs. Butterfield*, 18 N. H. 115.

This was an action in case for a libel alleged to have been published, or caused to be published, in a newspaper called "The Gleaner." The plaintiff produced at the trial the editor of "The Gleaner," who testified that the article in question was written by him from materials furnished by the defendant, some of which were furnished in a conversation and some furnished in a letter which the witness said he had received from the defendant. The witness pointed out in the article some of the materials which he said were so furnished him, but could not tell which were furnished in the letter.

The court (Gilchrist, J.) say (p. 117):

"A libel is a written picture, or other sign, and is so distinguished from slander, which consists in words spoken.

"But he who by words causes another to write or paint the thing conveying the libelous matter may be as guilty as if his own hand traced the lines.

"It would, however, confound this distinction between the two offenses of verbal and written slander to charge him who speaks the words as the author of a libel which another, of his own motion, composes and publishes from the materials thus furnished.

"This action is against defendant for publishing a libel in the 'Gleaner;' the evidence is that he communicated orally some of the materials that were woven into the production by the witness, and that a letter, supposed upon evidence presently to be considered, to have been written by the defendant, furnished other materials. The letter might itself have been a libel but a different one no doubt, from that complained of in the action."

"Now this evidence comes entirely short of proving that the defendant published, or procured another

to publish, any libel whatever in 'The Gleaner.' It does not appear that he ever requested a libel to be composed out of the materials that he supplied, or that he expected, or had any cause of suspecting, that his communication would have been used for such a purpose.

"The case bears no resemblance to that of *The King vs. Johnson*, 7 East, 65, where the defendant not only had previously requested the insertion of a communication upon the subject of the alleged libel in Mr. Cobbet's paper, but in one of the communications recognized the preceding as having been published in that paper, and used expressions denoting that they had been sent for that purpose."

And see also—

Adams vs. Kelly, Ry. & Mood. 157.

Rex vs. Cooper, 8 Q. B. 533, reviewed in *Parkes vs. Prescott*.

The King vs. Johnson, 7 East. 65.

3. *Perhaps the most conspicuous error of the instruction is that in the absence of any request to publish the alleged libel the defendants were responsible for any part or parts "suggested" or "inspired" by the letter.*

According to the doctrine of the court a party who communicates to another a slander or libel is liable, not only for the repetition of it by the latter, but even for any new slander or libel that may be suggested or inspired by it.

Thus in the present case the defendants were held liable both for the republication of the libel contained in the letter and also for any new and different libel suggested or inspired by the letter.

This doctrine is wrong in respect of the republication of the libel communicated and *a fortiori* in respect of another libel suggested or inspired by the one communicated. A man is properly held answerable for what he says or writes or causes another to say or write, but there is no warrant in law or reason for holding him responsible for the action of

another who voluntarily chooses to repeat what has been said or written, or, more than that, to commit a new wrong upon the suggestion or inspiration of what has been said or written. The sublimated and nebulous doctrine of suggestion or inspiration figured very largely at the trial, though a matter of guess work and not supported by a particle of evidence.

See prayer of defendants modified (R. 67, 68), Charge (R. 72).

Brown, the publisher, testified as a witness (R. 10-14), but his evidence gives no color to the theory that the alleged libel was other than the emanation of his own mind.

The republication is not in law the natural and proximate consequence of the original slander or libel. This is settled by many decisions.

Townsend on Slander and Libel, Secs. 112, 117.

Ward *vs.* Weeks, 7 Bing. 211.

Tunnecliffe *vs.* Moss, 3 Car. & K. 83.

Barnett *vs.* Allen, 1 F. & F. 125.

Dixon *vs.* Smith, 5 H. & N. 450.

Parkes *vs.* Scott, 1 H. & C. 153.

Stevens *vs.* Hartwell, 11 Metc. 542.

Terwilligen *vs.* Ward, 17 N. Y. 54.

Gough *vs.* Goldsmith, 44 Wisc. 262.

Hastings *vs.* Stetson, 126 Mass. 323.

Shurtleff *vs.* Parker, 130 Mass. 130.

In Hastings *vs.* Stetson, *supra*, Gray, C. J., says:

"It is too well settled to be now questioned that one who utters a slander is not responsible, either as a distinct cause of action, or by way of aggravation of damages of the original slander for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

As to Defendant Bailey.*6th Error Assigned.*

The second instruction, given at the instance of the plaintiff (R. 65), relates to the responsibility of Bailey for causing or procuring the publication of the alleged libel, the first instruction relating to Leetch and the company. The second embodies all the errors of the first as the responsibility of Bailey is in terms made dependent upon the first—indeed could not be otherwise.

The predicate of the responsibility of Bailey is that he knew the figures as to cost, in the written statement of the plaintiff, were derived from the books of the company, and were not the estimates of the plaintiff, as they appeared to be in the statement, and that so knowing, he gave the statement to Leetch for the *purpose* of enabling him to communicate them to Brown for the *purpose* of publication.

These two “purposes” are utterly devoid of any support in the evidence.

As to Bailey’s knowledge in respect of the figures, it is true that when the statement was prepared by the plaintiff, Bailey gave him what information he sought from the books of the company, but it is equally true that that information was given to a party entirely competent, from his own knowledge and experience, to judge of its correctness, and was adopted, and indeed has never been questioned.

But coming to the “purposes,” the only evidence is that of Bailey himself (R. 40, 42). He swears that he gave the statement to Leetch and “did not know what he wanted with it,” that “he did not give Leetch any data to reply to the letter; there was nothing thought about writing the letter at all,” etc. It is perfectly clear from the evidence of Bailey that he knew nothing as to what Leetch was going to write, and as to the letter itself, he never saw it or had any knowledge of its contents before it was sent, nor afterwards until the alleged libel had been published.

As stated, Bailey was the only witness. It may be said the jury might not credit him. Conceding that, however, the case was left without any particle of evidence connecting Bailey in the remotest manner with the publication of the libel.

II

Variance in Form and Substance between the Declaration and Proof.

4th Error Assigned.

In the case at bar the libel complained of is set out in these words: "A certain false, scandalous, malicious, and defamatory libel of *the tenor* following, to wit."

By the use of this form of pleading the pleader has bound himself to set out *verbatim* the libel complained of, and must follow it up by showing *the act* of publication by these defendants of that *libel* and if there be a *variance* between the form of the libel alleged and the proof it is fatal.

In *Wright vs. Clements*, 3 B. and Ald. 503, Abbot, C. J., says:

"In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the court may judge whether they constitute a ground of action; and unless a plaintiff professes to set them out he does not comply with the rules of pleading.

"The ordinary mode of doing this is to state that defendant published, of and concerning the plaintiff, the libellous matter, to the tenor and effect following. In that case the word 'tenor' governs the word 'effect,' and binds the party to set out the very words of the libel.

"Holroyd, J.: The law attaches a technical meaning to the word 'tenor' as signifying either an exact copy or a statement of the libel *verbatim*. . . . Now, where a charge, either civil or criminal, is brought against a defendant, arising out of the publication of a written instrument, as is the case in for-

gery and libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court whether the facts stated amount to a cause of action or a crime. . . . A defendant is not bound to put the question as a combined matter of law and fact to the jury, but has a right to it as a mere question of law to the court."

"Tenor" imports *identity*, and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be regarded as a fatal variance.

Ruffin, J., in *State vs. Townsend*, 86 N. Car. 676.

State vs. Bonney, 34 Me. 383.

People vs. Warner, 5 Wend. 271.

Com. vs. Wright, 1 Cush. 65.

State vs. Johnson, 26 Iowa, 407.

Com. vs. Stevens, 1 Mass. 203.

Again: Any allegation which narrows and limits that which is essential, becomes *descriptive* and must be proved as alleged. Thus in contracts, *labels in writing* and written instruments in general, every part operates by way of description of the whole.

Greenleaf on Evidence, Secs. 58, 59, 60.

Newell on Defamation, 804.

Perry vs. Porter, 124 Mass. 339.

Crotty vs. Morrissey, 40 Ill. 477.

Chapin vs. White, 102 Mass. 139.

Gates vs. Bowker, 18 Vt. 23.

Strader vs. Snyder, 67 Ill. 404.

Parkes vs. Prescott, L. R. 4 Ex. 168.

Adams vs. Kelley, 21 E. C. L. 157.

Whiting vs. Smith, 13 Pick. 371:

III.

Wealth of Defendant Company.*8th Error Assigned.*

The admission of illegal evidence as to the financial condition* of the company, and the failure to withdraw and caution the jury.

Pennsylvania Co. *vs.* Roy, 102 U. S. 451.

In some States the admission of illegal evidence is not cured even by withdrawal.

Howe Machine Co. *vs.* Rosine, 77 Ill. 105.

Fire Ins. Co. *vs.* Rubin, 79 Ill. 402.

Erbin *vs.* Lorillard, 10 N. Y. 299.

Furst *vs.* Second Ave. RR., 72 N. Y. 542.

In others the rule is that the evidence may be withdrawn, and this is the doctrine of the Supreme Court in the above case. The withdrawal, however, must be explicit and not inferential, and the court must instruct the jury to disregard the evidence.

See above cases and also Hilliard on New Trials, 409.

IV.

Privileged Communications.*9th Error Assigned.*

“It is a matter of law for the judge to determine whether the occasion of writing or speaking criminal language, which would otherwise be actionable, repels the inference of malice, constituting what is called *privileged communications*.”

Cook *vs.* Wildes, 85 E. C. L. 328.

Taylor *vs.* Hawkins, 71 E. C. L. 307.

Shurtleff *vs.* Stevens, 51 Vt. 501.

In case of privileged communication malice must be proved, and therefore its absence must be presumed until such proof is given.

Somerville *vs.* Hawkins, 70 E. C. L. 583.

Simmons *vs.* Holster, 13 Minn. 249.

The rule as to what constitutes a *privileged communication* is thus stated by Blackburn, J., in *Davies vs. Snead*, 5 L. R. Q. B. 611:

“That when a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication.”

Approved, Waller *vs.* Loch, 7 L. R. Q. B. D. 622.

The rule has also been stated thus:

“A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.”

Sanderlin *vs.* Bradstreet, 46 N. Y. 191.

Lewis *vs.* Chapman, 16 N. Y. 369.

Bradley *vs.* Heath, 12 Pick. 163.

Mo. Pac. RR. Co. *vs.* Richmond, 73 Tex. 568.

Marks *vs.* Baker, 28 Minn. 162.

And this would be so, although the duty be not strictly legal, but of imperfect obligation to a person having a corresponding interest or duty.

Van Wyck *vs.* Aspinwall, 17 N. Y. 191.

Harrison *vs.* Bush, 5 El. & Bl. 344.

Moreover, the question is not whether the statements, contained in the letter of Leetch, are true or not, *as a matter of fact*.

"All we have to examine is, whether the defendant stated more than what he believed, and what he might reasonably believe; if he stated no more than this he is not liable."

Cockburn, C. J., in *Spill vs. Maule*, L. R. 4 Ex. 237.

Davis vs. Snead, L. R. 5, Q. B. 608.

Townsend on Libel, Sec. 241, p. 209.

Maitland vs. Bramwell, 2 Fost. & Fin. 623.

Chatfield vs. Comerford, 4 Fost. & Fin. 1008.

If a man *bona fide* writes a letter in his own defense, or for the defense and protection of his interests and rights, and is not actuated by any malice, that letter is privileged although it may impute dishonesty to another.

Coward vs. Worthington, 7 Car. & P. 528.

Townsend on Libel, Sec. 240.

V.

Authority of Leetch to Act for Company.

10th Error Assigned.

There is no evidence upon which the jury could find against the defendant, The Washington Gas Light Company, for the evidence is conclusive that no authority was delegated to Leetch other than such as pertained to the executive management of the works, the manufacture of gas and the *materiel* and *personnel* belonging thereto, and nothing else.

In addition to a board of directors, there were a president, secretary, assistant secretary, treasurer and general superintendent (the title under which Leetch is sued), and it will be assumed that in addition to the duties assigned to these

various officers, there must be a large residue of authority, undelegated, which could be exercised by the board of directors and the stockholders only. The necessities of the situation demand it.

From the authorities it is clear that the law demands as a prerequisite to the responsibility of the master for the servant's wrongful acts, that the particular matter (be it the driving of a carriage or a locomotive, the carrying out of the rules of the company or the investigating of the subordinates of a railroad company) in which the servant has done wrong shall be one which the master has *intrusted to the servant*; and the ground is, that for reasons of public policy he is chargeable with the duty and responsibility of selecting for each position a proper person to perform the duties intrusted to him.

In the leading case, *Sleath vs. Wilson*, 9 Car. & P. 607, quoted with approval by Justice Grier in *Phila. & R. RR. Co. vs. Derby*, 14 How. 468, Lord Erskine lays down the law thus:

"It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. . . . The ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it."

And in *Railroad Co. vs. Derby* (above), the court finds that—

"The *intrusting* such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, the *causa causans* of the mischief."

And in *P. W. & B. RR. vs. Quigley*, 21 How. at p. 210, Justice Campbell says:

"The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *ex delicto* in the course of their business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

Steamboat Co. vs. Brockett, 121 U.S. 637.

And in the case of *Denver and Rio Grande RR. vs. Harris*, 122 U.S. 587, the decision of the court was based directly upon the fact, that the Vice President and Assistant General Manager were *intrusted with the particular matter in hand*; the tort was committed "by an armed body of men, organized and under the command of its chief officers."

In each case, therefore, the question is one of fact, to be made out by the evidence. Was the act complained of done by the servant in regard to duties *intrusted to him to perform by the master*, or (to put the same idea in different words) was it in the line of his employment?

The only act with which the corporation can be charged is the letter of Leetch (R., p. 12); and the question above can be best answered by looking at the letter to which this was an answer (R., p. 10):

Under the circumstances, the law will undoubtedly stand firm upon the assumption that this is a situation, the key to which has not been *intrusted* to a treasurer, or to a secretary, or to an assistant secretary, or even to a president, and least of all, to one whose *line of employment* is the making of gas.

It may be in the *line of employment* of the vice president and the general manager to commit the corporation to responsibility for an assault and battery; it may be in the *line of employment* of the treasurer to commit the corporation to responsibility for forgery or arson; but very strict proof

should be demanded and enforced before such a departure from the regular, conventional, every-day *line of employment entrusted to such officials* is stamped with the seal of a court and dignified by its judgment.

The question in each case is one of proof of the fact that the particular act done was in relation to a duty entrusted to the official whose act it is alleged binds the company, and the company is entitled to all the assumptions of law that it conducts its business in the regular way, known and recognized by all who ever come in contact with corporations and deal with their officers in business.

"A master is responsible for a wrongful act done by his servant in the execution of the authority given by the master and for the purpose of performing what the master has directed."

Gray, C. J., in *Hawes vs. Knowles*, 114 Mass. 518.

Fogg *vs.* B. & L. R. Co., 20 N. E. Rep. 109.

Freeborn *vs.* Singer Sewing Machine Co., 2 Manitoba Rep. 253.

So. Ex. Co. *vs.* Fitzner, 59 Miss. 581.

Harding *vs.* Greening, 8 Taunt. 42.

In *Carter vs. Howe Machine Company*, 51 Md. 290-8, which was an action for malicious prosecution arising through the alleged false arrest of the plaintiff by the agent of the corporation, the court, after citing authorities, hold that to render the corporation liable for the acts of its agents—

"It should be made to appear that the agent was expressly authorized to act by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant entrusted with the company's money or goods; and before the corporation can be made liable for such an act it must be shown either that there was express precedent authority for doing

the act, or that the act has been ratified and adopted by the corporation."

Illinois Cent. RR. *vs.* Downey, 18 Ill. 259.

Isaacs *vs.* Third Ave. RR. Co., 47 N. Y. 122.

Had the Board of Directors taken action we might have had the *Quigley Case*. Had Leetch *been intrusted* with the whole policy of the company without regard to the limits of his own department we might have had the *Derby Case*. Had Lansden been ejected from the office by the janitor with unnecessary violence we might had the *Brockett Case*.

But, as it is, we have the case put by Lord Erskine, of a coachman who takes his master's coach out of the coach house without his knowledge, and with it commits an injury.

The evidence as to Leetch's duties and the matters *entrusted to him* is the following:

R. 37: John R. McLean, the president of the company, says:

"That Leetch had no positive employment until after Mr. Lansden left; that witness does not think that he was put in exactly the position of Mr. Lansden; that in fact he was appointed generally to take care of the works and to do the best he could for the company; that he was a gas engineer and took care of the works."

CHARLES B. BAILEY, secretary, R. 40:

"That it was the general practice of the office that correspondence of that sort shall first go to the secretary. (R. 42.) That the correspondence belonged to the secretary's office."

R. 42:

"That in February, 1894, Mr. Leetch was general manager of the company; that he took the place of what used to be the engineer; that they have now

two engineers, one at each end, who are subordinate to Mr. Leetch; that every letter is not written from the secretary's office; that all letters relating to the engineer's department pretty much are written by the engineer or superintendent; that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department; that witness does not think Mr. Leetch would have been the proper officer of the company to give the information which Mr. Brown wanted; that the letter would properly, if it was addressed to the company, have been answered from the secretary's office; that it was not answered from his office, because Mr. Leetch answered it himself; that that was a letter referring to the truth or falsity as to the cost of the production of gas; that most of the letters relating to the cost of the production of gas would properly come to the secretary's office."

R. 44:

"That the Brown letter came to Mr. Leetch; that it was shown to or read to the witness, but not handed to him, and he did not know it had been answered until he saw it in the *Progressive Age*; that he did not answer it as secretary, because it was out of his possession; that if the treasurer of the company should take a letter belonging to his department and keep it, witness would presume that he kept it for some purpose, and would probably wait until he handed it back again; that he would recognize his right to do that, and he would recognize the right of the general manager to take papers that he wanted to see which would come to him as secretary; that he has the right to take such papers (R. 45), but he does not answer letters that are outside of his particular line, as a general thing; that his right to answer any letters addressed to the company has never been officially denied; that if he wants to answer it, witness presumes he would. . . .

"Q. And has he also the right to answer letters?

"A. That would be a question.

"Q. Has it ever been questioned by your company?

"A. No; not officially.

"Q. He has always exercised the right to answer such letters as he saw fit?

"A. He does not answer letters that are outside his particular line, as a general thing.

"Q. Has his right to answer any letter to your company ever been denied to him?

"A. No.

"Q. If he wants to answer it he does it?

"A. I presume he would.

"Q. That was acquiesced in by your company?

"A. It never has been denied."

R. 46. WM. B. ORME:

"Records of the company as to the duties of the engineer." (R. 46, 47).

R., p. 50. JOHN LEETCH:

"He is at present the general manager of the Washington Gas Light Company and has had about eleven years' experience in the manufacture of gas . . . that the envelope in which that letter came was addressed 'John Leetch, Manager Washington Gas Light Company;' that the answer to that letter was written by the witness unaided, without the assistance of anybody; that it was a personal letter, and that he answered it as such . . . that the company had nothing to do with it; . . . that he did not write that letter in the performance of his duties as general manager; . . . that he simply wrote the letter to him and witness replied as a mere act of courtesy, outside of his duty as manager of the company."

R. 52:

"That none of the letters which have been read in evidence were written by him in his capacity as general manager of the Washington Gas Light Com-

pany; that it was a mere personal matter altogether, exclusive of any duty that he owed to the gas company."

R. 54:

"That sometimes where the letters have any bearing upon their duties—some inquiry about some matter that may refer to the gas business in general—he would talk with them and show them the letter; that he and Bailey talked together in that way . . . that he never noticed until less than a week ago that this letter was addressed to the Washington Gas Light Company."

R. 55:

"That he never opened a letter directed to the Washington Gas Light Company."

VI.

The Verdict Finding Only Part of the Issue Is Void.

12th Error Assigned.

The judgment must be reversed, because the jury found only part of the issue. The defendants, five in number, joined in the plea (R. 7); and then followed the joinder in issue.

The jury was sworn to try the whole issue, and not part of it. The verdict was against three, and silent as to the others. Such a verdict is void, and a judgment thereon will be reversed.

"If a verdict only finds part of what is in issue, it is bad, because the jury have failed in their duty, which was to find *all that is in issue*."

Bacon's Abridgement: "Verdict" (M).

A *venire de novo* is grantable where the verdict finds less than the whole matter put in issue.

2 Tidd's Practice, 922.

"A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried *the whole issue* wherewith they are charged. As if an information of intrusion be brought against one for intruding into a messuage and a hundred acres of land, upon the general issue the jury finds against the defendant for the land, but saith nothing for the house, this is insufficient for the whole and so it was twice adjudged."

Coke upon Lyttleton, 226, 227.

"If the verdict omitted *anything within the province of a jury to find*, no judgment could be given and there must be a *venire de novo*."

Lord Mansfield in *King vs. Dean*, 3 T. R., 128.

Quoted and approved in *U. S. vs. Watkins*, 3 Cranch C. C. 575.

Thus it is seen that the invariable rule in England, according to the common law, is that if a verdict is confined to part only of the matter in issue it is void and a *venire de novo* must be granted.

This same principle is laid down by the Supreme Court of the United States as well as by the highest courts of the various States.

The leading case is that of *Patterson vs. United States*, in 2 Wheat. 221 (1817), where the court, through Washington, J., says:

"A verdict is bad if it varies from the issue in a substantial matter or if it find only a part of that which is in issue; and though the court may give form to a general finding so as to make it harmonize with the issue, yet if it appears that the finding is different from the issue, *or is confined to a part only of the matter in issue*, no judgment can be rendered upon the verdict. . . . The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial manner, *or if it find only a part of that which*

is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. *Whether the jury find a general or a special verdict it is their duty to decide the very point in issue;* and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court or to the appellate court that the finding is different from the issue or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

This case was approved and affirmed in *Downey vs. Hicks*, 14 How. 246, where McLean, J., says:

"A verdict is bad if it varies from the issue in a substantial manner *or if it finds only a part of that which is in issue*; and if it appears that the finding is different from the issue or is confined to part only of the matter in issue, no judgment can be rendered upon the verdict."

Downey vs. Hicks, 14 How. 246 (1852).

The case of *Patterson vs. U. S.* was also approved in *U. S. vs. Watkins*, 3 Cranch C. C. 575, where Cranch, C. J., delivering the opinion of the court, quotes at length from the opinion rendered by Mr. Justice Washington (quoted above) and cites a number of cases in support thereof. In this case, the jury having failed to respond to the whole of the issue, the court held that a *venire de novo* must be awarded.

U. S. vs. Watkins, 3 Cranch C. C. 574-'6.

And again:

"In *Patterson vs. U. S.*, Judge Washington lays down the whole law precisely as we view it. . . . He says, 'Whether the jury find a general or special verdict, it is their duty to decide the very point in issue, and if it appears to that court or to the appel-

late court that the finding is different from the issue or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."

Garland vs. Davis, 4 How. 147.

Hodges vs. Easter, 106 U. S. 408, 418.

Browne vs. Browne, 22 Md. 103.

Ford vs. State, 12 Md. 515.

State vs. Carleton, 1 Gill. 250.

Eng. & Am. Enc., Title Verdict, Vol. 28, p. 285:

"Thus, also, if A, B and C be sued jointly by D, and a jury sworn to try the issues as to them all, a verdict finding the issues as to A and B only, and saying nothing as to C, would not be received, or a judgment rendered upon it would be reversed."

W. D. DAVIDGE,

R. ROSS PERRY,

Attorneys for Plaintiffs in Error.

No. 43.

11. 1898
JAMES MCKENNEY
CLERK

By J. Johnson & Darlington for
D. C.

Filed Oct. 11, 1898.
In the Supreme Court of the United States.

OCTOBER TERM, 1898.

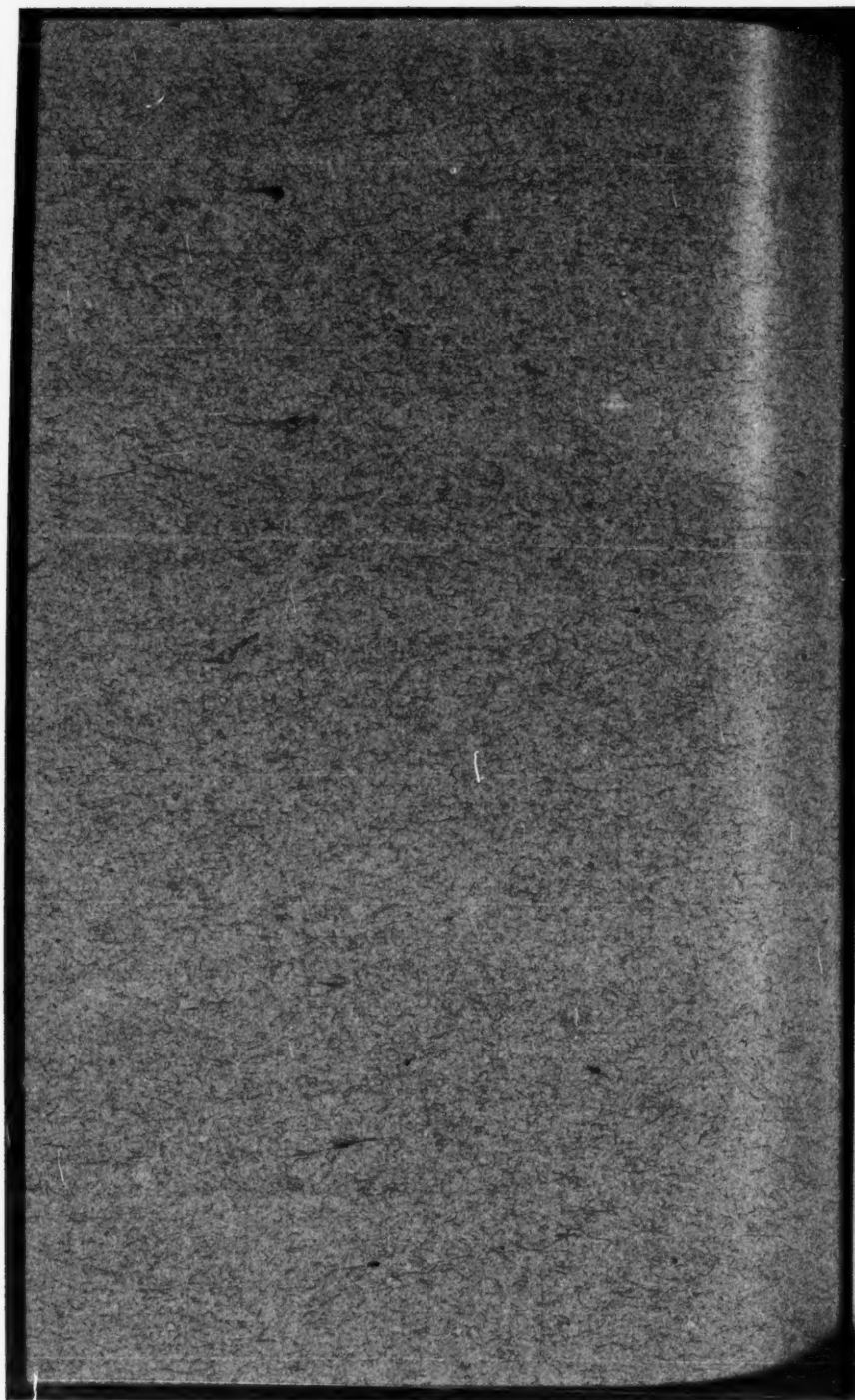
No. 43.

THE WASHINGTON GAS LIGHT COMPANY ET AL.
PLAINTIFFS IN ERROR.

THOMAS G. LANSDEN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

J. ALTHEUS JOHNSON,
J. J. DARLINGTON,
Attorneys for Defendant in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 43.

THE WASHINGTON GAS LIGHT COMPANY ET AL.,
PLAINTIFFS IN ERROR,

vs.

THOMAS G. LANSDEN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

This is a civil action for libel brought by the defendant in error, plaintiff below, against The Washington Gas Light Company; John R. McLean, its president; Charles B. Bailey, its secretary; William B. Orme, its assistant secretary, and John Leetch, its general superintendent, defendants below. The verdict of the jury was "guilty," as to the defendants The Washington Gas Light Company, Charles B. Bailey and John Leetch, which last-named defendants are the present plaintiffs in error.

The libel complained of consisted of a publication in the *Progressive Age*, a periodical printed in the city of New York, and widely circulated throughout the country among gas producers and manufacturers, charging, in effect, that the plaintiff had committed perjury, in that, in 1893, while he was an employé of the Washington Gas Light Com-

pany, he had given certain answers, under a resolution of Congress, to the effect that its gas cost 48.38 cents per thousand in the holder, and 40.09 cents per thousand feet for distribution; and that in 1894, having lost his position with the defendant company, and because of that fact, he had testified that its gas could be put into the holder for about 32 cents per thousand, and distributed for between 20 and 22 cents per thousand, which libel the plaintiff alleged was composed and published, or caused to be procured and published, by the defendants.

STATEMENT OF FACTS.

The plaintiff was a gas engineer of thirty years experience in the construction of gas works and the manufacture of gas, who had occupied the position of superintendent of the defendant company from November, 1886, to June, 1893, at a salary of \$5,000 per annum, having occupied a similar position in St. Louis at the same salary for some eleven years prior to November, 1886.

In the spring of 1893, the defendant John R. McLean, president of the defendant company, informed the plaintiff that the Sundry Civil Appropriation bill, as passed by the House of Representatives, had reduced the price to be paid by the Government for gas to 75 cents per thousand feet; that the matter would probably be the subject of investigation before the Senate Committee; that he desired the plaintiff to come before that committee as a witness on behalf of the defendant company, and that he wished the plaintiff to write out something from which he, McLean, could prepare some questions to give to a committeeman upon which to question the plaintiff. Record, pp. 24, 30.

The plaintiff testified that thereupon he prepared a memorandum in the form of questions and answers, set out at pages

26, 28 of the Record, except that, as originally submitted to Mr. McLean, the said memorandum contained nothing as to the cost of gas; that said McLean said to plaintiff, "You say nothing here about the cost of gas," and was told by the plaintiff that the cost of gas must come from himself, or from the secretary; that he was thereupon furnished with a statement, putting the cost of gas in the holder at 48.38 cents per thousand, and the cost of distribution at 40.09 cents per thousand; that plaintiff said to McLean at the time, "It can not be possible that your gas costs that much?" to which McLean replied that they were entitled to charge interest on their investment, and that the plaintiff then wrote in those figures, stating, at the time, "It does not make any difference to me. If the committee asks me, I will give them to them as your figures." The plaintiff further testified that the items of cost could only come from the books, which were kept at the office of the secretary of the company; that the plaintiff could approximate the cost of gas in the holder, from knowing the amount of coal that was used, and the cost of labor, but that there were many items entering into its manufacture which were not purchased by the plaintiff, and the cost of which was not furnished to him; that he never knew the actual cost of the manufacture of gas, and could not know it unless he had access to the books of the company; that he never saw the books, either during his employment with the defendant company, nor afterwards; and that it would have been impossible for him, estimating merely as an expert, and without the books of the company, to have figured the cost down to the hundredth part of a cent, as was done in the figures inserted in the memorandum. Record, pp. 24-5, 28-9, 30-1, 33, 62-3.

The plaintiff was not called as a witness on behalf of the defendant company in 1893, and gave no testimony that year. The memorandum in question, he testified, was furnished for the private use of the defendant McLean, and was

left with said defendant. In April of that year, the defendant Leetch was employed by the defendant company, and in the following June the plaintiff, at the suggestion of its president, tendered his resignation, and was succeeded by the said Leetch, the latter, however, being given a more extensive employment than the plaintiff, and being designated as "general manager." Record, pp. 24, 28, 33, 29, 50.

In February, 1894, inquiry was made by the Senate Committee into the cost of the manufacture of gas, and the plaintiff, by invitation, appeared before that committee and testified that, in his opinion as an expert, gas could be put into the holder at from 30 to 32 cents per thousand feet, and could be distributed at from 20 to 22 cents per thousand. Record, pp. 25, 30.

The defendant, McLean, it is true, testified that the figures in the memorandum of 1893 were not given by him to the plaintiff, or "that he does not believe he got this information for Mr. Lansden;" but he admits that the salaries of the clerical force entered into the cost, which salaries were not paid by the plaintiff, who had no means of knowing what they were. The memorandum in question he further testified he gave to the secretary or assistant secretary, stating it to be a valuable thing, which ought to be put away and kept for reference. Record, 36, 38, 39.

Mr. Bailey, the secretary of the company, testified that the plaintiff called on him for some figures in relation to the distribution of gas; that he does not remember what he furnished plaintiff, but that he furnished him what he asked for; that he gave him no percentage of the cost of gas, but simply footings, which Lansden took away, and derived his own results from them; that these footings included all salaries and office expenses, and everything outside of the manufacture of gas, being the expenses incurred after the gas was put into the holder; and that the accounts kept at the office of the superintendent show the quantities of coal, oil, lime,

and other materials used in the manufacture of gas, in which accounts the price is carried out in cents and fractions of a cent; but said witness, at p. 43 of the Record, corrected this statement, and admitted that the accounts and monthly reports at the office of the superintendent did not show any prices or statement of costs, but simply the amount of material used during the month; and that these reports did not show taxes, which were something over \$40,000 per annum, or insurance, or the cost of street lamps, which were over \$20,000 per annum, nor the expenses of extending gas mains and gas pipes, which would be between \$20,000 and \$30,000 per annum, none of which items were within the plaintiff's knowledge, but came from the books of the defendant company, and that it was purely a matter of bookkeeping to ascertain from the books what the cost of the manufacture of gas was. Record pp. 40 et seq.

The testimony in the case further showed the following correspondence between E. C. Brown, editor of the *Progressive Age*, and the defendant John Leetch, general manager of the defendant company:

"E. C. Brown, publisher. Established 1883.

"Office of Progressive Age. Gas, Electricity, Water.

"NEW YORK, February 12, 1894.

"Washington Gas Light Co., Washington, D. C.

"GENTLEMEN: I have watched with great interest the continued reports of the proceedings against your company as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Was his statements correctly reported in the Washington Star of 3rd inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

"Very truly yours, E. C. BROWN."

WASHINGTON, D. C., Feb. 13, 1894.

"E. C. BROWN, Esq., Publisher Progressive Age, 280 Broadway, N. Y.

"DEAR SIR: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former supt. of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

"As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

"As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for 70 cents and to the consumer for \$1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

"Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington, and made the following replies:

"Q. What does gas cost to manufacture at your works?

"A. It costs us 48.38c. per thousand in the holder and 40.09c. per thousand for distribution.

"Q. Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

"A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

"Q. How do the prices charged for lamps in Washington compare with other cities?

"A. They are as low as anywhere the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps.

"You will notice that he makes a difference of about 18½ cents per 1,000 feet then as compared with

his statement now, although he must know that the material used—coal and labor—is just the same now as then, except price of naphtha, which is higher. You can try to reconcile the two statements.

“Very truly yours,

“JOHN LEETCH,
“*General Manager.*”

“E. C. Brown, Publisher. Established 1883.

“Office of Progressive Age. Gas, Electricity, Water.

“New York, February 14, 1894.

“John Leetch, *General Manager.*

“*Washington Gas Light Company,*

“*Washington, D. C.*

“MY DEAR SIR: I thank you for your prompt reply to my letter of the 12th inst. Your statements, as contained therein, are exceedingly interesting, I can assure you. It would seem that the inference as to the occasion for the statement could only result from one cause.

“I would ask you, if you can do so, without too much trouble to yourself, to give me, categorically, the questions propounded to Mr. Lansden and answered by him as reported in ‘The Star’ of the 3d inst. I should like to reproduce exactly the questions and his replies under the former resolution of Congress, February, 1893, and follow up with the same covering the present investigation.

“I will not ask you to hurry about this, for I can not use the matter until our issue of the 1st of March; but then, I can assure you, I will take it up in the proper way. Any other facts of interest that you can give me in this connection, I shall appreciate.

“Mr. Lansden is a gentleman whom I have met on only one or two occasions, and I scarcely know the man; but I should have thought that he or any one possessing ordinary judgment would not have placed himself in the awkward situation that he seems to have done, judging from the two records he

has made during investigations. I know that the gas industry, as a whole, will not feel very kindly toward Mr. Lansden, from the fact that his statements, made at the recent investigation, as to the cost of manufacturing and distributing gas are being republished in scores of papers throughout the country, and many gas companies far removed from Washington will have to battle against the recent statements of Mr. Lansden.

"Very truly, yours,

"E. C. BROWN.

"Will the testimony be printed? If so, I should like to secure a copy of the same."

"E. C. Brown, Publisher. Established 1883.

"Office of Progressive Age. Gas, Electricity, Water.

NEW YORK, *February 19, 1894.*

"Mr. John Leetch, Gen'l Manager Washington Gas Light Co., Washington, D. C.

"DEAR SIR: I trust our letter of the 14th inst. in reply to yours of the 13th was duly received. I hope you are intending to give me questions propounded to and answered by Mr. Lansden during the present investigation similar to the manner in which you gave me the questions then answered by him under the former resolution, as appears in your letter of the 13th. I am wanting to treat this matter in the way it should be touched on, and I have in mind publishing Mr. Lansden's testimony on this particular point side by side.

"Among all the gasmen whom I have talked with about his peculiar position, not one says a good word for him, as might naturally be expected.

"Please let me hear from you as early as convenient, and oblige,

"Yours truly,

"E. C. BROWN."

"WASHINGTON, *Feb. 20, 1894.*

"E. C. Brown, Esq., publisher *Progressive Age*, 280 Broadway, N. Y.

"DEAR SIR: I am in receipt of yours of the 14th and 19th instant. This delay in reply was my inability to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee.

"Today I received a copy, which I herewith inclose for your use.

Respectfully,

JOHN LEETCH,

General Manager.

See, also, for further correspondence, pp. 52, 53 of the Record.

The testimony of the defendants Bailey and Leetch further shows that, upon receipt of the Brown letter of February 12, 1894, said Leetch exhibited the same to the defendant Bailey, and that he, Bailey, said to Leetch,—

"I have a paper in Mr. Lansden's own handwriting where he stated that the price of gas was so and so, and the price of distribution was so and so;"

that he made this statement to Leetch in connection with the said Brown letter of February 12, 1894, and gave him the paper in question; and that when he handed Leetch the said answers of 1893, written by Mr. Lansden, he knew that the items of those answers, at least in so far as they related to the cost of distribution, did not rest upon Mr. Lansden's own personal knowledge, but came from the books of the company; and that the defendant Leetch thereupon took the said answers and wrote the letter to Brown of February 13, 1894. Record, 42, 44.

It was attempted on the part of the defendant to establish by the testimony of the defendant Leetch that his letter of

February 13th, upon which the article in the *Progressive Age* was based, was a mere personal letter, intended as a courtesy merely to the editor of *The Age*; and that it was not written by him in the performance of his duties as general manager of the defendant company. The defendant Bailey, also attempted to cast some doubt upon the question whether it was within the province of the general manager to write that letter in reply to Brown's communication of the 12th February. Record, p. 44-5.

As to the testimony of the defendant Leetch upon this point, however, the evidence disclosed the fact that he was without any personal acquaintance with Brown (Record, pp. 51, 54); that the inquiry of the latter was addressed, not to Leetch personally, but to the "Washington Gas Light Co., Washington, D. C. Gentlemen:" (Record, p. 10); that there was nothing in that letter of inquiry which the defendant Leetch himself could point out as indicating that it was a personal letter to himself (pp. 54, 55); that, after he answered it, the letter was placed among the other papers of the company in the secretary's office (p. 55); that his letter of February 13th, and all the other letters written by him to Brown, were copied by him into the letter-book of the company, kept in the secretary's office, "in which he has the privilege of making copies for the general office work"—all the letters in which book were written either by the secretary, the assistant secretary, or the general manager, and all which letters were signed by said officers officially. Record, pp. 62, 64. The testimony of Mr. Leetch was further weakened by his positive statement that he "did not know, and had no reason to know, until it came out, that Mr. Brown was getting up this data to publish in his article," (p. 56), until forced to abandon that position upon being confronted with Brown's letters of February 14th and 19th (pp. 49, 50), asking an extra copy of the questions and answers propounded to and answered by Mr. Lansden during the present investigation, similar to the manner in which

you gave me the questions then answered by him under the former resolution, as appears in your letter of the 13th, stating that the writer proposed publishing the plaintiff's alleged "testimony on this particular point side by side," and Leetch's own letter of February 20 in reply (p. 50), enclosing one of the only twenty copies of the testimony of 1894 at that time published, "for your use."

The testimony of Mr. Bailey, upon the point whether it was within the scope of the duties of the general manager to reply to the letters of Brown, is equally infirm. He admits, on pages 42-3, that Leetch was general manager of the company, and that he "took the place of what used to be the engineer;" that every letter is not written from the secretary's office; that—

"all letters relating to the engineer's department, pretty much, are written by the engineer or superintendent,"—

and that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department; although, on the same pages, the witness adds he did not think Leetch was the proper officer to give the information Brown wanted, and that *most* of the letters relating to the cost of the production of gas would properly come to the secretary's office.

As will be seen from the instructions given by the court, the question was left to the jury to determine, upon this evidence, whether Leetch's letter of February 13th was written and forwarded by him in the course of his duties as general manager of the defendant company, for the purpose of supplying the data which it contains for a publication in the *Progressive Age*; as, also, whether the defendant Bailey, secretary of said company, called the attention of said Leetch to the so-called Lansden answers of 1893, and gave them to him, for the purpose of enabling him to communicate them to Brown as Lansden's own statements, knowing them to have been furnished Lansden from the books of the company, and that they were not figures produced or arrived

at by him personally. The jury, with the witnesses before them, and the consequent opportunity to observe their appearance, their bearing and their manner of testifying, determined these questions affirmatively; and the trial court, with the like opportunity for observing and hearing the witnesses, was satisfied with the verdict, and refused to disturb it.

The statement of the case set forth in the brief on behalf of the appellants contains some inaccuracies in point of fact, which it may lessen the labor of the court to point out specifically here:

1. At p. 12 of the brief, it is stated that the plaintiff claimed, "without any evidence," that Bailey knew the figures in the statement of 1893 not to be the estimate of the plaintiff. At pp. 41-2, 43 of the Record, Mr. Bailey, himself, testified that, as to the cost of manufacture, it would have been "an endless task" to make up the figures from any data possessed by the appellee, and at pp. 44 that *he knew*, when he gave the statement to Leetch,

"that the items in the answers, *at least* in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden's personal knowledge; that they came from the books,"

and that he, Bailey had, himself, given many of the items to the appellee.

2. The brief, at p. 14, states the uncontradicted evidence to be that Leetch, when he wrote his letter, believed that the statement of 1893 contained the appellee's estimate of the cost of the manufacture and distribution of gas, referring to p. 53 of the Record in support of this statement. The fact is, the appellants offered no evidence whatsoever tending to prove that Leetch did not know, as well as Bailey, that the figures contained in that statement were figures for which Lansden was in no wise responsible.

3. The brief, at p. 15, states that the appellee admitted he could closely approximate the cost of manufacture, but

utterly failed to explain the wide difference in respect of manufacture between the statement and his evidence in 1894, etc. On the contrary, the uncontradicted evidence is that, when the figures were given him, the appellee said, "It can't be possible that your gas costs that much;" that Mr. McLean claimed that they were entitled to "charge interest on the investment," and that the appellee thereupon said,

"It don't make any difference to me. If the committee ask me, I will give them to them as your figures."

Record, pp. 25, 33, 83-84.

4. It is claimed, at p. 16 of the brief, that there is no evidence that Brown's letter of February 12, 1894, was ever received by the company, or *express* authority given to Leetch or anybody else to answer it. The general manager and the secretary both testify that the letter came to their hands and was read by them; the secretary thereupon gave the general manager the statement of 1893, and the latter forwarded it to Brown, with an accompanying letter, signed by him as "General Manager," and copied into the regular letter-press book of the company, into which its official correspondence was copied. The president, the assistant secretary, the general manager, and all the directors except one who was ill and another who was nonresident, appeared as witnesses in the case, no one of whom attempted to deny the general manager's authority to do all that he did.

THE ASSIGNMENTS OF ERROR.

The appellants' eleven assignments of error present the following propositions of law:

I. That the defendants are not liable for the libel as published, because the article containing it is not, in its entirety,

the composition of the defendants, or any of them. This proposition embraces the first, fourth and eleventh assignments of error, and rests upon the rejection by the court of the appellants' prayers for instructions numbered "1," "8," and "20," at pp 66, 67 and 79 of the Record.

II. That the court erred in instructing the jury, in effect, that if the information furnished by the appellants to the editor and publisher of the *Age* was so furnished by them with the knowledge that it was likely to be, or probably would be, used as the data for a publication in said *Age*, and that it was furnished by them maliciously for such purpose or with such knowledge, the appellants were legally responsible for the publication to the extent that its contents were suggested by the data so supplied. This proposition embraces the second, fifth and seventh assignments of error, and rests upon the granting by the court of the plaintiff's first and second prayers for instructions (Record, pp. 64-65), and the modified form in which the appellants' prayer for instructions numbered "7" (p. 67) was granted.

III. That the court erred in leaving it to the jury to determine whether the appellant Bailey, at the time when he gave Leetch the so-called Lansden answers of 1893, knew that the statement as to the cost of the manufacture and distribution of gas contained therein were estimates furnished the plaintiff from the books of the company for the purpose of being inserted in said paper, and were not figures produced or arrived at personally by him. This objection is presented in the third and sixth assignments of error, and rests upon the granting by the court of the plaintiff's second prayer for instructions. Record, p. 65.

IV. That the court erred in admitting evidence as to the financial condition of the appellant, the Washington Gas Light Company. This objection embraces the eighth assignment of error, and rests upon the exception to the admission of that evidence, set forth at pp. 34-5 of the Record.

V. That the court erred in refusing to instruct the jury

that the Leetch letter of February 13 was a privileged communication, and that, in consequence of such privileged character, there could be no verdict against any of the defendants in whom no express malice was shown to exist. This is the ninth assignment of error, and rests wholly upon the rejection of the appellant's prayer for instructions numbered "13," at p. 69 of the Record.

VI. That the court erred in instructing the jury that, if Leetch was the general manager of the Washington Gas Light Company, and if he wrote and sent the letter of February 13 in the course of his duties as such general manager, and for and on behalf of said company, the company was bound by his act, though not expressly authorized or subsequently ratified by its board of directors. This objection is presented in the ninth assignment of error, and rests upon the granting of the plaintiff's first, and the rejection and modification of the appellants' second, tenth, eleventh and sixteenth prayers for instruction. Record, pp. 64-70.

VII. That the court erred in entering judgment upon the verdict, which finds the appellants, the Washington Gas Light Company, Bailey and Leetch guilty, and is silent as to the defendants McLean and Orme. This objection is the twelfth assignment of error, and rests upon no objection or exception taken at the time, or contained in the Record.

It will, perhaps, conduce to clearness if these several questions are considered separately, instead of being blended, several of them, together, as in appellants' brief.

I.

The first question for consideration, then, is: Are the appellants, if otherwise guilty, to escape liability for their wrong because the data furnished by them, though for that purpose, was written up by the editor in his language, and theirs, and accompanied by comments of his own?

This question is treated of in the appellants' brief, and

the supplement thereto, in connection with the doctrine of of variance; and the authorities cited in support of the objection are, without exception, cases recognizing and applying the well-established principle of pleading that, where the libel offered in evidence differs, even in slight verbal particulars, from the libel set out in the declaration, the difference is one of *description*, and will constitute a fatal variance.

Where there is such a variance—

“objection should be made to reading the article on that ground, and, if overruled, an exception taken. If this is not done, the objection can not be raised in the Appellate Court.”

Clay *vs.* People, 86 Ill. 147.

As will be seen from the Record (pp. 12, 14, 17), the Leetch letter of February 13 was first offered and read, after which the article as written by Brown and published in *The Age* was offered and read in evidence, without objection of any kind. Nor was the objection of “variance” made at any later stage of the trial, that ground of objection being interposed in the Appellate Court for the first time. The only exceptions in the record to which the first assignment of error can relate, is to the court’s refusal to charge the jury as requested in the defendant’s prayers numbered “8” and “20,” that, if the defendants did not cause or procure to be published the entire article complained of, or if that article differs materially from Leetch’s letter of February 13th, then the defendants would not be liable for any part of it, and the verdict should be in their favor.

The defendant’s prayer No. 20 was properly rejected upon another ground, viz.: It required the court to withdraw wholly from the consideration of the jury the Leetch letter of February 20th, in reply to Brown’s letters of February 14th and February 19th, inclosing the desired copy of Lansden’s answers before the Senate Committee in 1894, forwarded for the express purpose or “use” of enabling Brown to

publish "Mr. Lansden's testimony on this particular point side by side." The instruction in question required the jury to find for the defendants, if the published article differed materially from the letter of February 13th, although such difference may have largely consisted in the publication, side by side with the answers supplied by the letter of February 13th, of the answers given the committee in 1894, which were forwarded by Leetch on February 20th, for the express purpose of being so published in contrast.

The defendants' eighth exception, therefore, is the only one available for their first assignment of error; and that exception raises the question, only, whether a defendant who has participated in the concoction and publication of a libel, is exonerated from liability if his associate in the wrong includes other matter, whether libellous or not, in the same publication—a question we are willing to submit without argument

The objection is a purely technical one, and the technical answer to it, if it stood alone, would seem to be complete.

As pointed out above, however, the legal proposition involved relates only to identity of description in pleading. It does not require that, where the article declared on *is* identical with the article offered in evidence, and thus satisfies the rule, the party charged with causing or procuring its publication shall, nevertheless, escape responsibility, if the libel, though substantially his, is not wholly in his phraseology, or contains comments and additions by the party whom he has caused or procured to publish it.

The rule, and the reason of it, are clearly laid down as far back as *Queen vs. Drake*, 3 Salk. 224. In that case, the information, which was for libel, differed from the libel offered in evidence in the single word *nec* instead of *non*, and the variance was held fatal upon the following grounds:

"There can be no *tenor* of words spoken, because there is no written original; but there may be a *tenor* of a writing, which word always imports a true copy

of the thing written, and consists in identity. A libel may be described either by the sense or by the words, and, therefore, an information charging that the defendant made a writing containing such words is good, and in such case a nice exactness is not required, because it is only a description of the sense and substance of the libel. But an information, charging the defendant with making a writing *secundem tenorem sequentem*, then the written libel and that set forth in the information must exactly agree, because every word in the information is a mark of description of the very libel itself; so in trespass, *quare clausum fregit*, etc., if the plaintiff sets forth the buttalls and boundaries of his close, and fails in the proof thereof, he can not recover, *because he is obliged to prove his description, and there is no difference between wrongs done by words and by things.*"

So in *Commonwealth vs. Hannen*, 2 Gray, at page 291:

"When the publication of a written or printed instrument, statement or representation is made the basis of civil or criminal proceedings against its author or publisher, it ought to be set out in the complaint or declaration, not only with substantial, but with literal accuracy and precision. *Commonwealth vs. Wright*, 1 Cush. 63. . . . In such a description of the alleged defamatory matter, every part operates by way of description of the whole, and the libel proved can not be the same with that which is the subject of the prosecution, when they vary as to any part, however unimportant. 3 Stark. Ev., 4th Amer. Ed. 1546."

And, upon the resulting distinction between differences in allegation, and variances in description, see *Gates vs. Bowker*, 18 Vt. 23; *Commonwealth vs. Varney*, 10 Cush. 403, 404; *State vs. Perrin*, 3 Brev. 152.

The rule in question is not peculiar to actions for libel, nor for torts. If a declaration upon a contract describe it as bearing a certain date, or as being for a certain amount, there will be a fatal variance if the contract offered in evidence bears a different date, or is for a different sum; but,

if the requirement as to the accuracy or identity of description is complied with, recovery will not be defeated because it may appear that the instrument was not executed on the day it purports to have been, or that the full consideration it recites, and which is declared upon, did not in fact exist, or the like. These are matters of substantive allegation, which may be varied in proof, affecting, though not defeating, the recovery; while, in matters of *description*, variance is fatal.

Returning to the feature in controversy in the case at bar, it will readily be seen that there is here no case of variance or discrepancy between the libel declared upon and that offered in proof. There is no claim in the record that the publication in the *Progressive Age* offered in evidence differs in any respect from the libel set forth in the declaration. The appellants' objection is evidently based upon the misconception that the letter of February 13th is the libel sued for; whereas the action is upon the article published in *The Age*, and the letter of February 13th is simply one link in the chain of evidence, or one of the facts and circumstances submitted to the jury, from which to determine the truth of the allegation that the defendants caused or procured its publication.

Viewed in this, its correct light, the appellants' objection is simply this: We are charged in the declaration with having caused or procured the publication of the entire article. We, in fact, caused or procured the publication of only a part of it, to wit, that part which, under the *innuendo*, comprises the entire libel complained of; therefore, we are liable for no part of it.

In *Coghill vs. Chandler*, 33 Mo. 115, the words laid in the declaration were—

“I believe John Coghill shot my dog, and he shot him for the purpose of stealing, and he is the fellow who stole my molasses.”

The answer denied having spoken the words contained in the declaration, and this was “the only issue made by the pleadings.” The proof showed only the words, “He is the

fellow who stole my molasses." The court's refusal to instruct the jury that the words charged were not supported by the evidence, and that they should find for the defendant, was sustained, the appellate court saying:

"The rule is that the words proved must substantially correspond with those alleged in the declaration. It is not necessary to prove all the words laid, unless they constitute one entire charge. . . . The absence of proof to show that he also uttered the other words imputed to him does not, under the rule laid down, constitute a material variance—the words *he is the fellow that stole my molasses* embracing within themselves, and independent of what preceded them, an allegation of larceny."

So, in the present case, every part of the publication charged by the plaintiff under the *innuendo* as constituting the libel, is clearly found by the verdict to have been communicated by the appellees to Brown in aid of his express purpose to publish his testimony upon this particular point "side by side."

In *Lewis vs. McDaniel*, 82 Mo. 577, a similar rule was declared, and an instruction to the jury that, if they found any of the words stated in the declaration to have been proven to constitute substantially the charge imputed to plaintiff, they should find for the plaintiff, was sustained.

See, also, *Casey vs. Hubechon*, 25 Mo. App. 91.

Purple vs. Horton, 13 Wend. 9, 24.

Barr vs. Gaines, 3 Dana, 258 and citations.

Dufresne vs. Weise, 46 Wis. 290.

Scott vs. McKinnish, 15 Ala. 662, 665 and citations.

Miller vs. Miller, 8 Johns, 74.

Purcell vs. Archer, 7 Tenn. 317.

McClintoch vs. Crick, 4 Iowa, p. 459 and citations.

Compagnon vs. Martin, 2 Wm. Bl. 790.

Baker vs. Young, 47 Ill. 42, 46.

Loomis vs. Snick, 3 Wend. 205.

Nestle vs. Van Slyck, 2 Hill, 282.

These, it is true, are actions for slander; but in the particular here being considered—namely, the effect of proving some, but not all, of ~~the tortious~~ conduct alleged, where that which is proved is of itself sufficient to constitute a cause of action—there is no difference in the rule of law applicable. There is in this respect, as the court say in *Queen vs. Drake, supra*, “no difference between wrongs done by words and by things.”

It will be observed that none of the authorities cited in support of this first assignment of error are pertinent to the question here presented. In all of them, there was variance between the libel as set forth in the declaration and that offered in evidence. Authorities are not wanting, however, either here or in England, upon the question presented in this case; and upon it, it is believed, they are entirely harmonious.

In *Strader vs. Stryder*, 67 Ill. 405, the defendants had sent to the publisher of a newspaper for publication a written communication, signed by them, reflecting upon the character of the plaintiff. Changes were made in the phraseology of the article in publishing it, though none which altered the sense in respect to the alleged libellous words, and the declaration was upon the article as published. The defendants asked the court to instruct the jury that, unless the words and phraseology of the manuscript were identically the same as in the newspaper article, there could be no recovery: *held*, rightfully refused. The court said:

“The action was brought for the words published in the newspaper—not those in the manuscript. The materiality of the latter as evidence was only upon the question of the agency of the defendants in the procurement of the former; in short, it was for the purpose of showing that the newspaper article was published in consequence of the production by the defendants of the manuscript for the purpose of being published. In this view, mere verbal alteration, not affecting the sense, would not exonerate. To have that effect, the alterations must be material.”

And the court cites *Adams vs. Kelly*, 20 E. C. L. 403, to the effect that, where a reporter gave a written statement to the editor of a newspaper, the contents of which had been communicated to him by the defendant for the purposes of publication, what the reporter published in consequence of what passed with the defendant, though with some alterations not affecting the sense, might be considered as published by the defendant.

In *Miller vs. Butler and Jencks*, 6 Cush. 71, the libel was written by Jencks, in the presence of Butler. The proofs were to the effect that one of them proposed to the other the writing of it, and that Butler encouraged the writing of it and suggested some of the expressions. The libel was a letter which two days later was found in the post office, addressed to one Bartlett, by whom it was received in course of mail. It was objected that there was not sufficient evidence against the defendant Butler. The court said:

“The evidence of publication was quite sufficient to authorize the jury to find that fact as against both defendants. The letter to Bartlett was written by Jencks, Butler assisting in composing it, and written in pursuance of a previous proposal made by one to the other. It was then sent by mail to Bartlett. Both parties to the transaction were engaged in a common object, and the acts of one are to be taken as having been done by both, as to the legal effect attached to them.” 2 Greenl. Ev., Sec. 416.

The analogy between this case and the case at bar would seem to be perfect. Brown first writes the defendant company for data, promising that the data furnished will be treated as confidential “as to source of information,” and the company, through its secretary and general manager, thereupon, in response, sends him the alleged Lansden answers of 1893, with a statement couched in such language as fairly to convey the impression that they were testimony given by him under a former resolution of Congress. Brown

then writes to the general manager of the company for an exact copy of the plaintiff's testimony in 1894, stating, as his reason for desiring it, his contemplated purpose of printing the plaintiff's supposed contradictory "testimony upon this particular point side by side;" whereupon the general manager procures one of the only twenty copies published for the use of the committee, and forwards it to Brown, "for your use," and the publication of the libel follows. Here was the previous proposal of the one to the other, the invited assistance given in aid of that proposal, the participation of both in the common object, and the consequent evolution and publication of the libel complained of, embodying, precisely and fully, the data contributed for the purpose of the proposed publication.

In *Howe Machine Co. vs. Souder*, 58 Ga. 64, an advertisement, reflecting upon the plaintiff, was published in a newspaper. Later, it was changed by one proven to be the agent of the corporation, who at the same time promised to pay for it; *Held*, that a corporation might publish a libel; that the act of its agent in controlling and promising to pay for the libel authorized the jury to infer that it was authorized by the corporation, and that the judgment against the corporation should be affirmed. There was no pretense that the board of directors authorized the libel, or that authority to publish such an advertisement had been by it conferred upon the agent.

In *Clay vs. People*, 86 Ill. 147, the defendant voluntarily made a statement of facts to a reporter of a newspaper, who partly wrote up an article based upon them, and then communicated them to the editor, who completed the article, with sarcastic comments of his own. The article was read from the proof-sheets to the defendant, who said it was a little rough, but it was true, and let it go. The defendant did not write any part of the article, or request its publication: *Held*, he could not defend on the ground that he did not write and publish the article himself.

In *Reg. vs. Cooper*, 55 E. C. L. 533, the defendant was indicted "for publishing and causing and procuring to be published," a libel in a newspaper. The editor testified that the defendant expressed a wish that he would "show up" the party libeled, and told the editor the story which formed the basis of the article, and, before the publication, remarked to the editor that it had not yet appeared. The article embodied the story substantially as told by the defendant, with comments of the editor exhibiting the plaintiff in a ludicrous light. After its appearance, the defendant told the editor he had seen it, and liked it very much. It was objected that the defendant only told the story, and that the comments, which gave a ridiculous character to the whole, were added by another, and that there was a variance produced by the publisher having added matter.

The facts of this case would seem to agree in every essential particular with the case at bar. In that case, it is true, the defendant asked the editor to publish, while, in this, the editor made the proposal and asked for the data. In that case, also, the defendant expressed his approval of the entire article, after its publication, while in this the general manager, being applied to by Brown, was at first silent, and, upon a second application by Brown, after suit was threatened, merely corrected the inaccuracy as to the alleged Lansden answers of 1893 having been given by him before a committee of Congress (see *Record*, pp. 53, 52), leaving Brown to adhere to the article in all other respects without dissent or objection by him. The inaccuracy thus tardily corrected, moreover, is one which Leetch's letter of February 13 fairly and naturally suggested, and which he did not correct in his reply to Brown's letters of February 14 and February 19 (*Record*, pp. 49-50), which last named letter disclosed the sense in which the latter understood Leetch's letter of February 13. These are the only differences in the facts of the two cases, and, it is submitted, they in no way vary the legal question involved.

In this case of *Reg. vs. Cooper*, the court said:

"If a man requests another, generally, to write a libel, he must be answerable for any libel written in pursuance of his request; he contributes to a misdemeanor, and is therefore responsible as a principal. He takes his chance of what is published. . . . It is observed that there were additions, but the editor said that what the defendant communicated was substantially what was published. If we held this not to be a publication by the defendant, we must go to the length of exonerating a party who gives instructions for a libel in every case where the libel published departs from the instructions by a single word. It is enough that there is a substantial identity. . . . A variance is out of the question, in the situation in which this party has placed himself. That which did appear is what he instigated and approved of." Denman, C. J.

"It would be very dangerous to allow a man to direct a libel to be published, on a particular subject, and, after he has approved of what is published, to defend himself on the ground that something has been added to his original communication." Wrightman, J.

To similar effect, see—

Parker vs. Prescott, L. R., 4 Ex. 169.

The legal principles contended for in the supplemental brief of the learned counsel for the appellants will not be combated here, but, it is submitted, they are without application to the case under consideration. It may well be true that A, who has libeled C, is not liable for the act of B, who copies that libel upon another piece of paper, if A was in nowise concerned in B's act; but if B applied to A for the libel, and A furnished it for the purpose of having B copy it, or write another libel based upon it, the liability is undoubted. In the very case of *Cochran vs. Butterfield*, 18 N. H. 115, referred to in the supplemental brief as "decisive," the defendant's freedom from liability was expressly

based upon the ground that he not only did not request a libel to be composed out of the materials that he supplied, but that he never—

“expected, or had any cause of suspecting, that his communication would have been used for such a purpose.”

It is stated, at page 20 of the appellant's brief, that “the letter of the 13th of February, 1894, was the sole predicate of liability.” The inaccuracy of this statement, though of course inadvertent, is singular. The general manager Leetch, not only wrote the letter of February 13, enclosing the answers of 1893, stating in effect that the contradictory statements of 1894 were made because of Lansden's loss of employment with the company, and suggesting to the editor of *The Age* that he might “try to reconcile the two statements,” but, in response to the latter's request for a verbatim copy of the answers of 1894, that he might publish the two “side by side,” the general manager procured one of the few copies printed for the Senate Committee and forwarded it to Brown, “for your use”—i. e., for the very purpose the latter had announced (Record, 49–50). A more conclusive “predicate of liability,” it is submitted, could not exist.

II.

The second assignment of error is to the action of the court in submitting to the jury the question whether the publication was caused or procured by the defendants, upon all the facts of the case as disclosed by the evidence, instead of instructing them, as requested by the defendants' seventh prayer, that they were not liable unless they requested or solicited the publication, and if the article was published without their knowledge.

The allegation of the declaration in this respect is, not that the defendants requested or solicited the publication of the

article, but that they caused or procured it. It certainly can not be essential to legal liability for causing or procuring an act, that such causing or procuring should have been through the instrumentality of an express request or solicitation; nor do any of the authorities which the industry of counsel has collected give even color to such a proposition. In *Cochran vs. Butterfield*, 18 N. H. 115, one of the authorities cited, the decision is placed upon the ground that the defendant did not request the publication, and neither expected nor had reason to expect that the materials communicated by him would be used for the composition or publication of a libel. The case of *Parkes vs. Prescott*, L. R., 4 Ex. 169, is in no respect in conflict with the ruling of the learned justice who tried the case at bar, while the other authorities cited are wholly aside from the question in controversy.

The appellants' seventh prayer, was, moreover, necessarily rejected, because one of the questions of fact it proposed for submission to the jury, viz., whether the article was published without the defendants' knowledge, was without any evidence to support it. Mr. Leetch, it is true, at first testified that he did not know the article was to be published until he saw it in the magazine (*Rec.*, p. 56); but, on being confronted with Brown's letters to him of February 14 and 19, asking a copy of Lansden's testimony before the committee in 1894, stating, in terms, that he contemplated publishing the alleged testimony "side by side," and with his own letter of February 20th, in reply to these communications, forwarding the testimony of 1894 in compliance with the editor's request and for his "use," he receded from this statement, and admitted, as he was compelled to do, knowledge upon his part, when he wrote the letter of February 20, that Brown intended to publish the statement, and that he knew this because "Brown so stated in his letters." *Record*, p. 56.

That the libel was caused by the appellants, if that fact were required to be determined by this court, is demonstrated by the *Record*.

The editor's first letter (p. 10-11) discloses the fact that he was entirely without any information or data as to the matters which appear in the libel. He merely expresses surprise at the character and extent of the plaintiff's testimony before the committee in 1894, invites information as to the object of it, and promises, not that the information would be considered as confidential, but that it should be so considered "as to source of information," merely; thus declaring, in effect, that the information which should be supplied in compliance with his request would be published.

Thereupon the general manager, having exhibited this letter of inquiry to the secretary, and having been furnished by him with the so-called Lansden's answers of 1893, in connection with that letter (42), writes the letter of February 13 (Record, p. 12), stating in effect that Lansden made the alleged answers which are set forth in it "under a former resolution of Congress, bearing date of February, 1893," that his testimony in 1894 was given with the knowledge on his part that the cost of materials was as high, and one of them higher, in 1894; that the motive which prompted what the Brown letter designated as his "attack" was the fact that his employment by the company had been terminated, and that the editor, whose letter had indicated his purpose to publish the information given, could "try to reconcile the two statements."

In reply to this letter, the general manager receives the editor's letters of February 14th and February 19th, assuring him that his statements are "exceedingly interesting," stating that the plaintiff's testimony of 1894, seemingly, "could only result from one cause;" asking that he would furnish the editor, categorically, with the questions propounded to the plaintiff and answered by him in 1894, stating that the latter wished "to reproduce exactly the questions and his replies under the former resolution of Congress, February, 1893, and following with the same covering the present

investigation"; that he was not asked to hurry about this, "for I can not use the matter until our next issue of the 1st of March; but, then, I can assure you, I will take it up in the proper way";

that any other facts of interest the general manager could give him he should appreciate; that the editor knew the gas industry as a whole would not feel very kindly toward Mr. Lansden, and that he has it in mind to publish his testimony "on this particular point side by side;" the letter of February 14th, further referring to the two alleged statements as "the two records he has made during investigations," and thus disclosing the sense in which he understood the allegation of the Leetch letter of February 13th, as to the occasion upon which the plaintiff made the alleged answers of 1893.

Thereupon, with these letters before him, and without any attempt at correction of the false impression concerning the answers of 1893, which his former letter had naturally, if not intentionally, conveyed, Mr. Leetch, under his official signature as "general manager," writes the letter of February 20th, 1894, Rec., p. 50, forwarding the desired copy, obtained with difficulty, of the plaintiff's testimony in 1894, "for your use," and the publication follows on the agreed date, March 1, 1894, containing precisely the charges which were indicated in the Leetch letters and the accompanying data supplied—"written up," or expanded in form, and accompanied by sarcastic comments of the editor, as in the cases of *Reg. vs. Cooper*, and *Clay vs. People*, *supra*, and as was indicated in his letter to Leetch of February 14th, would be the case. The entire libel complained of, as fixed by the *innuendo*, and so far as the same is contained in the article, is based upon the data thus supplied the editor, under his express announcement, that he desired it for purposes of publication; nor is it claimed anywhere in the record that the editor had materials from any other source whatever from which the libel complained of itself, or any of the charges it contains, was in fact, or could have been, composed.

Under these circumstances, as stated above, if the question of fact, whether the defendants, or any of them, did cause or procure the composing and publication of the article were to be determined here, the record demonstrates the affirmative of that proposition. The only question here, however, is, whether that question should have been submitted to the jury, upon the facts and circumstances of the case, or whether the court should have instructed them that the defendants did not cause or procure, unless they affirmatively and expressly requested or solicited the composition and publication.

The criticisms upon the first instruction on behalf of the plaintiff, and the charge of the court to similar purport, it is submitted, are without merit. These criticisms are, principally, first, upon the submission to the jury of the question whether the letter of February 13 was written and sent for the purpose of supplying the data which it contained for *a*, as contradistinguished from *the*, publication in the *Progressive Age*; secondly, the submission of the alternative question whether it was written or sent with the knowledge that it was likely to be, or probably would be, used for such purpose; and, thirdly, the charge that, if the preceding hypotheses were found in favor of the plaintiff, the defendants referred to would be liable to the extent that the contents of the published article were suggested or inspired by that letter.

1. The first of these criticisms is to the effect that one who furnished the publisher of a newspaper with matter defamatory of another, for the purpose of having a publication made, based upon and embracing the matter so furnished, is not liable, unless he knew in advance just what *the* publication, in its entirety, would be, and furnished the date with that knowledge and to that end. That this ought not to be, and is not, the law, both the reason of the case and the authorities above cited, sufficiently demonstrate.

2. The second criticism, as applied to the facts of this case, is wholly without importance. Leetch testifies, in terms, that *he knew* Brown intended to publish the statement, because he so stated in his letters (Record, p. 56), and so knowing, he forwarded to him the copy of the answers of 1894, in aid of the use Brown stated he wished to make of them, *i. e.*, in aid of the latter's purpose to publish. It clearly was no error prejudicial to the appellants to allow the jury to pass upon the probability of a fact, which they themselves admitted to be true.

3. The third criticism, if of any materiality in itself, has none in connection with the prayer in question taken as a whole, or with the entire case.

In the first place, while it may be true, as stated by the Court of Appeals, that the instruction is somewhat redundant in its phraseology, there was nothing about it which could mislead the jury. It required them to find that the article falsely and maliciously charged the plaintiff with having testified falsely and contradictorily before a Committee of Congress, from improper motives, "and that such charges were fairly and naturally suggested and inspired by said letter of February 13," as the conditions under which the plaintiff was entitled to a verdict as against any of the defendants.

Both the publication and the letter were before the court, and the genuineness of each was conceded. That the latter did fairly and naturally suggest the charges referred to in the instruction is plainly apparent upon its face, and the court, whose province it is to construe writings, might properly have so instructed the jury, in terms. To submit the question whether it did so or not was clearly not error prejudicial to the defendants.

It is not reversible error to submit a question of law to the jury, where it is clear that they have decided it correctly. *Minneapolis Railway vs. Rolling Mill*, 119 U. S., 149.

In the second place, the ability and effort of counsel have been ineffective to discover any libel in the publication which was not based upon the application in question. The effort is made, and the only portions of the article which have seemed possible to be laid hold of for this purpose are the head lines, "The Acrobatic Performances of Lansden," and the reference to some "St. Louis exploit." The latter was not, and without some *innuendo* or allegation of its intended meaning could not be, claimed to be a libel; while the only action of the court which can by any possibility be held to refer to it is the granting of the defendants' ninth instruction, practically in their own language in so far as this question is concerned, and which instruction necessarily excluded the reference in question, the letter being wholly silent as to St. Louis or any of the appellee's actions or experiences there. That the instructions did not exclude the reference to the St. Louis exploit in terms, if a fault at all, is that of the defendants who framed it.

As to the head lines, the only acrobatic performances attributed to the appellee are the two contradictory statements the letter charged him with making, from improper motives, which statements the letters suggested that the editor "try to reconcile," and which the general manager forwarded to him in furtherance of his expressed purpose to publish them "side by side."

III.

The third and sixth assignments of error are to the action of the court in leaving to the jury to determine, upon the evidence in the case, whether the defendant Bailey, when he gave Leetch the so-called Lansden answers of 1893, knew that the statement as to the cost of the manufacture and of the distribution of gas contained therein were estimates furnished the plaintiff from the books of the company for the purpose of being inserted in the said paper,

and were not figures produced or arrived at by the plaintiff personally.

This assignment of error rests upon the general exception of the appellants to the plaintiff's second prayer for instructions, unaccompanied by any specific objections at the time or in the Record. As gathered from the assignment of error and the brief, the objections to that instruction, apart from those which apply equally to the first, and which have already been considered, are three in number, namely: (1) Absence of evidence that Bailey knew the items in question were derived from the books of the company, and were not the estimates of the plaintiff himself; (2) Absence of proof that Bailey gave the paper in question to Leetch for the purpose of enabling him to communicate them to Brown, and, (3) Absence of proof that he did so to enable Leetch to communicate them to Brown for the purpose of publication.

It is true, as is claimed, that Mr. Bailey denied that he possessed the knowledge referred to, or any of it, but such denial was by no means conclusive of the matter. It was for the jury, upon all the evidence in the case, including the manner and bearing of the witness upon the stand, and, especially of his self-contradictions and corrections upon this subject, to credit or discredit his denial, as they believed the fact to be; and it is the reference of this question of fact to them for determination which is alleged as error.

1. Upon the question whether he possessed the *data* from which to determine the cost of the manufacture of gas, there was a conflict of testimony between the plaintiff and Mr. Bailey; though, on being recalled (at page 43 of the Record), the latter admits that the *data* to which he referred as possessed by the plaintiff consisted merely of monthly reports of the quantities of material used, unaccompanied by any statement of prices or cost, these being shown only in yearly report, with which it is not claimed that the plaintiff had

anything to do; that it was purely a matter of bookkeeping to ascertain from the books what the cost of manufacture was; and (at pages 41-2), that his office, not the plaintiff's, was the only place where the books show the transactions classified for the year, and that it would be an endless task to go over the daily and weekly items, which are what he testified the plaintiff had, and classify them. The plaintiff testified, and was nowhere contradicted, that he never saw the books in the secretary's office, from which it alone, as appears by Mr. Bailey's testimony taken as a whole, it was at all practicable to get the figures set forth in paper of 1893 as the cost of manufacture. Surely, if the question stopped here, it was proper to refer it to the jury to determine whether Mr. Bailey did not know that these figures were not Lansden's.

The matter is placed beyond the field of discussion, however, when we come to the figures as to the cost of distribution. As to these, after specifying a number of items, running up into the neighborhood of \$100,000 or more, which the plaintiff, he concedes, had no personal knowledge of or *data* for acquiring, he admits frankly, at page 44, that when he handed Mr. Leetch these answers, written by Mr. Lansden, at the time he had this Brown letter in charge, *he knew that—*

“the items in those answers, at least in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden's personal knowledge; that they came from their books,”—

and that he, Bailey, had, himself, given many of those items to Mr. Lansden. If there was error at all, it is clear that it was in Mr. Bailey's favor, consisting only in referring to the jury for determination by them a question which he had himself, in terms, determined against himself.

2-3. In the second and third place, with respect to the claim that there was a total absence of evidence upon the questions, other than Mr. Bailey's denial of them, whether

he gave the paper containing the alleged Lansden answers of 1893 to Leetch to enable him to communicate them to Brown, and for the purpose of publication, direct and affirmative evidence in respect to them was not to have been anticipated. To require it would have been to rule that the defendants should not be held liable for the tort, unless they would confess it; and they, plainly, were in no confessing mood. Mr. Leetch, it will be remembered, even went so far as to swear that he did not know at all that Brown intended to publish the information he was giving him, until he saw the published article in the paper, and adhered to that statement until brought face to face with Brown's letter to him of February 14 and 19, declaring, in terms, that he wished that information for the very purpose of publishing it, and that he would do so in his issue of March 1.

There was, however, ample circumstantial evidence in the case to be submitted to the jury upon these questions, and to justify the conclusions in respect to them at which the jury arrived.

Mr. Bailey admits that Brown's letter of February 12, addressed to the Washington Gas Light Company, and enclosed in an envelope addressed to Leetch or its general manager, was shown him by Mr. Leetch. This letter, written on the business letterhead paper of the "*Progressive Age*," "E. C. Brown, publisher," asks information "concerning the object of Mr. Lansden's attack," and, as above stated, promises that the information given "will be considered confidential *as to source of information*," only; thus giving notice, hardly capable of being misunderstood, that the information itself would not be treated as confidential, but was wanted for publication.

Mr. Bailey further admits that it was upon being shown by Mr. Leetch this letter, the sole request in which was for the information and for the purpose indicated, and in connection with that letter, that he brought to his attention the paper in question, produced and exhibited it, and then gave it to him.

He further admits that, although, as above pointed out, he knew at the time that the—

“items in the answers, at least in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden’s personal knowledge,”

but came from the company’s books, and had been given Mr. Lansden by Mr. Bailey himself, he, nevertheless, upon being shown Brown’s said letter of request for information, said to Leetch:

“I have a paper in *Mr. Lansden’s own handwriting*, where *he* stated that the price of gas was so and so, and the price of distribution was so and so;”

that he stated this to Leetch “on the subject of this letter of Brown’s,” and that he then gave him the paper. Record, p. 42.

And the only question is, whether, in view of these facts and circumstances, proved by the testimony of Mr. Bailey himself, and reinforced by his appearance upon the stand and his manner of testifying as observed by the jury, it was error to leave to them, upon the whole evidence, the question whether he did not call the answers of 1893 to the attention of Leetch, and give them to him, for the purpose of enabling him to communicate them to Brown as Lansden’s own statement in regard to the actual cost of manufacture and distribution, as tending to impeach his sworn testimony before the committee of Congress, and for the purpose of publication.

IV.

The fourth objection, embracing the eighth assignment of error, relates to the admission of evidence as to the financial condition of the Washington Gas Light Company, for the consideration of the jury in case the plaintiff should be held entitled to exemplary damages.

The objection to this evidence set forth in the brief is that it was “illegal evidence,” and that there was no ground

for exemplary damages. The answer is, in the first place, that the objection is not true in point of law; and, in the second, that the objection was not made below, and, consequently, cannot be presented here.

It will be observed preliminarily, however, that the entire matter is wholly unimportant, the plaintiff having subsequently waived any claim to exemplary damages, and the court having instructed the jury to award the plaintiff, if their verdict should be in his favor, only "reasonable and fair compensatory damages, and nothing more." If anything more specific than this—as, for example, a specific withdrawal of the testimony in question—had been desired by the defendants, they cannot object to their failure to get it, since such failure was in consequence of their failure to request it.

Bell vs. Denson, 56 Ala. 449.

Warren vs. Wagner, 75 Ala. 205.

McNitt vs. Turner, 16 Wall. 362.

That a corporation may be liable for punitive damages for the wilful and malicious acts of its officers and agents is well established.

Cleghorn vs. N. Y. Central RR., 56 N. Y. 44.

Merrills vs. Tariff Manf. Co., 10 Conn. 384.

Maynard vs. Firemen's Ins. Co., 34 Cal. 48.

Denver RR. Co. vs. Harris, 122 U. S., 597.

Jeffersonville RR. Co. vs. Rogers, 38 Ind. 126-27.

New Orleans RR. Co. vs. Hunt, 36 Miss. 660.

Atlantic & Great Western RR. Co. vs. Dunn, 19 Ohio St. 102.

Goddard vs. Grand Trunk RR. Co. 57 Maine, 202.

That to forward, or to cause to be forwarded, to a newspaper, with liberty to publish, as plaintiff's own figures, the estimates of cost contained in the paper of 1893, well knowing at the time that they were not his, and for the purpose

of thereby impeaching his sworn testimony of the following year, is as wilful and malicious an act, and as deserving of punitive damages, as any which could well be imagined, may safely be submitted without argument.

But, in the second place, no such objection was made in the court below. The only ground of exception taken there was that the testimony was "immaterial and irrelevant," and that the counsel would concede the defendant company's ability to pay the amount claimed in the declaration. Record, pp. 34-5. These exceptions are clearly insufficient.

An objection to evidence on the ground that it is "irrelevant, incompetent, and immaterial," is too general, and the specification of the real grounds comes too late when made for the first time in the appellate court.

L. E. & W. Rwy. Co. vs. Parker, 94 Ind. 91.

McCullough vs. Davis, 108 Ind. 292.

Wash. Gas Light Co. vs. Poore, 22 W. L. R., 250.

Patrick vs. Graham, 132 U. S. 629.

Dist. of Col. vs. Woodbury, 136 U. S. 450.

The proposition that an objection not made below will be disregarded on appeal, is too familiar to require or justify the citation of authorities.

V.

The fifth objection, represented by the ninth assignment of error, and resting upon the rejection of the appellant's thirteenth prayer for instructions, at p. 69 of the Record, is to the court's refusal to hold the Leetch letter of February 13 a privileged communication.

This was a question to be determined by the trial judge, upon all the facts and circumstances disclosed by the evidence.

Newell on Defamation, Sl. & Libel, 389.

No evidence was offered tending to show any relation of duty, trust, confidence or obligation of disclosure of any kind between the appellants and the *Progressive Age*. The latter was simply a newspaper devoted especially to gas, water and electric interests, and the defendant company was simply one of its subscribers.

The meaning of the term "privileged communication" is, simply, a communication made upon such occasion as rebuts the presumption of malice, and the description of cases so recognized is such as are founded upon some recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it of the implication from which the general rule of law is deduced.

Townshend on Sl. & Libel, 229 and citations.

Newell on Sl. & Lib., 389.

What recognized obligation or motive, legal, moral, or social, could the trial court have found from the evidence to have existed in this case, for transmitting to the editor of the *Age*, as Lansden's own estimates, tending to establish the falsity of his sworn testimony in 1894, figures which the secretary admits he knew at the time were, in large part at least, not the plaintiff's estimates at all, but figures made up from the defendant company's books, which he never saw, and which were furnished to him by the very officer who, knowing the facts at the time, produced and represented them as the plaintiff's own figures?

To constitute a privileged communication, it must appear that the party had a right, or was under some obligation, to give the information, which was believed to be true; the mode and style must not contain intrinsic evidence of malicious intent over and above what is reasonably necessary and proper in conveying the information, and it must be free from attendant and concomitant extrinsic circumstances showing malicious intent.

Hall vs. Parsons, 23 Tex., 9.

"Where the circumstances do not show the defamatory matter to have been spoken or written in pursuance of some duty, or for the purpose of endeavoring to enforce a right, the communication is not privileged."

Polk. Starkie on Sl. & Lib., 681, Sec. 679.

Charges of crime in a newspaper against a candidate for Congress which are false are not privileged, though made without malice and in an honest belief that they are true.

Bronson *vs.* Bruce, 59 Mich. 467.

A fortiori, publications in a newspaper against one seeking an appointment or office not conferred through public suffrage, are not privileged.

Hunt *vs.* Bennett, 19 N. Y. 173.

And see, as to the inefficiency of belief as a defense—

Aldrich *vs.* Wilcox, 81 Ill. 77.

Fountain *vs.* West, 23 Iowa, 9.

Sand *vs.* Joervis, 14 Wis. 722.

Dole *vs.* Lyon, 10 Johns, 447, *et passim*.

In *White vs. Nichols*, 3 How. 266, privileged communications are declared to be of four kinds, viz:

1. Where the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.

2. Anything said or written by a writer in giving the character of a servant who had been in his employment.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to a committee appointed by the House of Commons to hear and examine grievances.

To which of these classes can it be said that the act of the appellants in this cause can be referred?

Even in an action against the publisher of a newspaper, and where the freedom of the press is accordingly involved, statements imputing crime, if not based upon any facts tending to prove the crime, are not privileged.

People *vs.* Detroit Post and Tribune Company, 54 Mich. 462.

Bailey's figures in 1897 did not tend to prove perjury upon the part of Lansden in giving his own differing figures in 1894. It was only by representing that *both* were Lansden's that the imputation could be effected, and the appellant's own testimony, cited above, shows that this was knowingly done.

But, even if the misrepresentation in this regard had been unintentional and through ignorance or mistake, which is not claimed, and if the supposed interest of gas manufacturers generally in refuting Lansden's testimony as to the cost of gas, as claimed at page 14 of the brief, can be held to have rendered communication to them of the contents of the libel a privileged communication, surely causing such communication to be made to the world through the columns of a public newspaper, can not be so regarded.

In *Beardsley vs. Tappan*, 5 Blatch. 497, it is declared that the principle upon which privileged communications rests, which of themselves would otherwise be libelous, imports confidence and secrecy between individuals.

And see *Sanderlin vs. Bradstreet*, 46 N. Y. 188.

Hunt vs. Bennett, 19 N. Y. 173.

Finally, and as conclusive of the proposition that publication in a newspaper can never be held a privileged communication, may be cited the opinion of this court in *Philadelphia, &c., R.R. Co. vs. Quigley*, 21 How. 202.

VI.

The sixth alleged error, presented by the tenth assignment of error, and which rests upon the exception to the granting of the plaintiff's first prayer, the rejection of the defendant's second and sixteenth, and the modification of their tenth and eleventh prayers, consists in instructions to the effect that, if the jury believed Mr. Leetch was the general manager of the defendant company, and that he wrote and sent the letter of February 13, 1894, in the course of his duties as such general manager, the company was bound by his act; that, if they should find from the evidence that the letter in question was not written by him as such general manager, for and on behalf of the company and in the discharge of his authorized duties as general manager, but personally and for himself only, their verdict must be in its favor; but that the word "authorized," in this connection, did not mean express authority from the board of directors to write the letter, if this particular kind or class of correspondence was within the purview of his general powers of general management.

Apart from the proposition that corporations are liable only for torts perpetrated or directed by their board of directors, which proposition it is considered unnecessary to argue, this objection would seem from the brief on behalf of the appellants to be based upon the claim—first, that the writing of the letter involved the exercise of discretionary power, in a matter exceptional in character; secondly, that the matter to which it related was, not the cost of gas, but the evidence of a witness; thirdly, that the letter was addressed to the company, and there can be no pretense that the board of directors delegated to Leetch authority to answer it; and, fourthly, that his duties were purely subordinate and ministerial, not embracing charge of the Congressional investigation, or authority to determine what answer, if any, to Mr. Brown's letter of inquiry was required by the interests of the company.

1. The first of these propositions presents the theory that, whenever an occasion which may be designated as exceptional in character, and as requiring the exercise of discretion, is presented, the officers of the company may act for it, without liability upon its part for any wrongs inflicted upon third persons or the public. As might have been anticipated, the learned and laborious research exhibited in the appellants' very able brief has failed to discover a single authority in support of this proposition.

The posting of the agent of a rival company as a swindler, the driving away by force and arms of the employés of a rival corporation engaged in maintaining possession of a parallel railroad track, and numerous other similar examples are to be found in the authorities of torts committed by the officers of corporations upon occasions exceptional in character, and requiring the exercise of discretion; but in none of them has the corporation been held exempt from liability upon such grounds.

2. The second of these objections is unfortunate in its juxtaposition to the last preceding assignment of error. There, it is urged that Mr. Leetch's letter was a privileged communication, on the ground that the subject to which it related, namely, the evidence of the plaintiff as to the cost of the production of gas, was a matter of such vital importance, not to the defendant company merely, but to all gas producers, as to constitute Mr. Leetch's letter, on that ground, a privileged communication, which he had the right to make. Here, the objection is that the subject to which it related was, not the cost of gas, but the plaintiff's evidence as to that cost, which was none of Leetch's business, anyway.

As a matter of fact, it appears that the general manager, himself, had appeared before the committee on behalf of the defendant company, and had opposed his testimony to that of the plaintiff (Record, p. 55), and that the report of that committee was still pending at the date of the libel, not having been submitted to the House until March 23,

1894. If, as is no doubt truly stated in the appellants' brief, it was "of vital importance to all gas producers" to ascertain if the plaintiff's testimony before the committee as to the cost of gas "was worthy of belief, or the outcome of prejudice and spite," this was peculiarly true of the defendant company, whose profits were immediately to be affected by the action of Congress, and whose general manager, employed in the effort to refute this testimony before the committee, had especial reason to break its force by establishing, in so far as he could do so, and by such means as he could, the "prejudice and spite" theory.

3. The third of the objections urged in support of the assignment of error now under consideration, namely, that the Brown letter of inquiry was addressed to the company, and "there can be no pretense that the board of directors delegated to Leetch authority to answer it," is, also, apparently unembarrassed by any attempt at consistency with the rest of the defense sought to be established. Throughout the trial, as shown by the Record, the effort was made to show that the Brown letter, being enclosed in an envelope addressed to Leetch, though as "Manager Washington Gas Light Company," was a personal letter to Leetch, so regarded by him, and so answered, as an act of courtesy, merely. Record, pp. 51, 54-5.

Mr. Bailey, the secretary, is the only witness on behalf of the appellants whose testimony bears at all upon the question of Mr. Leetch's authority to answer that letter. His testimony (pp. 42-3, 44-5) is to the effect that he was shown the Brown letter the day it was received, and saw that it was addressed to the company; that he did not answer it,—

"because it came to Mr. Leetch, and he evidently had not gotten through with it when he handed it to the witness;"

that Mr. Leetch was general manager of the company, and took the place of what used to be the engineer; *that every*

letter is not written from the secretary's office; that all letters relating to the engineer's office pretty much are written by the engineer or superintendent, and that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department, etc. This testimony is coupled, also, with the statement that he did not think Mr. Leetch would have been the proper officer to give the information wanted; that the letter, being addressed to the company, would properly have been answered from the secretary's office; that, although he saw it on the day it came in, it was not answered from his office, "because Mr. Leetch answered it himself;" that it was a letter referring to the truth or falsity as to the cost of the production of gas; that *most* of the letters relating to that subject would properly come to the secretary's office; that neither he nor his company did anything about it when they saw the letter had been made the basis of a charge that the plaintiff had testified falsely, nor did they take any measures to correct the article in any way; and that Leetch's right to answer any letter to the company had never been denied him, or officially questioned.

As stated, Mr. Bailey is the only witness who testified at all in support of the present contention, that reply to the Brown letter was not within Mr. Leetch's line of duty or general powers. In view of its contradictoriness, it was especially within the province of the jury, who saw and heard him, to pass upon the question which he, himself, could not, and would not, fairly and distinctly negative. Add to this the fact that the president, the assistant secretary, the general manager, and all the directors except one who was ill, and one who was a non-resident, were called to the stand by the defense, and that no one attempted to deny that the general manager had the authority to answer the letter, and it is difficult to see, not only how the trial court could have avoided submitting the question to the jury, but how the jury could have arrived at any other conclusion in regard to it.

4. The fourth objection, viz., that Mr. Leetch's duties were purely subordinate and ministerial, not embracing charge of the Congressional investigation, or making answer to the Brown letter, does not require separate consideration. If this claim is true, it should have been proven. The character of Mr. Bailey's testimony upon the point, and the fact that no one of the other officers of the company pretended to sustain it, added to the fact that the secretary not only acquiesced in Leetch's action in answering the letter, but, as the jury found, supplied him with the data for doing so, and that his was the only answer made, and the further fact that the company and all its officers acquiesced without objection in his action, and without any attempt to repudiate or correct it after the publication came to their attention, were certainly sufficient for submission to the jury upon the question of his authority. It is submitted that, in absence of opposing evidence, they were conclusive of it.

The general manager, with the active co-operation and aid of the secretary, as the jury has found by its verdict, did answer the letter, and occasion the publication; ten copies of it were sent the company by the editor on the day of its publication; the president admits that he knew of it after it appeared, though he claims he did not read it; while the assistant secretary testifies (p. 48) that he read it, was amused at it, and "thought it funny." The action of the general manager and secretary was never objected to by the company nor by any of its officers; and their want of authority in the premises is neither suggested nor claimed by any one except its attorneys at the trial of the cause.

The jury may infer from circumstances that an act of a corporation's employee is done in the course of his business as its servant; and, if so done, and the act is libelous, the corporation is liable, even though the act is in excess of the agent's authority and wrongful.

Fogg vs. Boston & Lowell RR. Co., 148 Mass. 513.

In this case, one Dow, who was in charge of a ticket office of the defendant company, which was arranged for the advertisement and sale of its tickets, posted up on the wall a clipping charging the plaintiff, who was a ticket broker selling rival tickets, with being a ticket swindler. There was no evidence that it was any part of his duty to post any notices pertaining to the business carried on in the office; but, in view of the fact that advertisements were posted there, that Dow was in charge of the office, and that the notice in question tended to diminish the plaintiff's and increase the defendant's income, it was held that it might be inferred that the act was done in the course of his business as a servant of the defendant company, and that the latter would be liable for it, without either actual knowledge or subsequent ratification, and though it was in excess of his authority and wrongful.

In *Denver, &c., Railway vs. Harris*, 122 U. S., 597, the appellant's vice-president and assistant general manager, with a force of its employés, attacked with deadly weapons the employés of a rival road, in the effort to dispossess the latter of a certain railroad, and seriously wounded the appellee. No vote of the board of directors or other authorization to capture the road in question was proved or claimed; *held*, that the fact that the attacking party was under the command of the defendant company's chief or controlling officers, rendered it liable for the tort, to wit, the murderous assault, with firearms, upon the appellee, and that the damages might be punitive.

See, also, *Salt Lake City vs. Hollister*, 118 U. S., 256.

In *Lake Shore Railway vs. Prentice*, 147 U. S., at pp. 113-14, commenting upon *Denver Railway vs. Harris*, *supra*, it is declared that—

“the appellant company in that case was held liable, not only to compensatory but to punitive damages, upon the single ground that the corporation, by its

governing officers, participated in and directed all that was planned and done."

These governing officers were the vice-president and assistant general manager, as against the general manager and secretary in the case at bar.

"The steady process of judicial evolution has led to the establishment, in some of the courts, of the just doctrine of responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents under the conditions which attach to individuals. *Philadelphia R. R. Co. vs. Quigley*, 21 How., 202; *Goodspeed vs. East Hadden Bank*, 22 Conn., 530; *Vance vs. Erie RR. Co.*, 3 Vroom, 334; *Copley vs. Grover & Baker Sewing Machine Co.*, 2 Woods, 494; *New Orleans RR. Co. vs. Bailey*, 40 Miss., 395. We approve this doctrine, and hold that a corporation may be held liable for a malicious prosecution conducted by its officers and agents, just as if the corporation were a natural person."

Williams vs. Planter's Ins. Co., 57 Miss. 764.

Copley vs. Grover & Baker Sewing Machine Co., 2 Woods, 494, is cited and commended in—

Salt Lake City vs. Hollister, 118 U. S., at p. 262.

See, also, *P. & R. R. R. vs. Derby*, 14 How. 468, 486. *Bank vs. Graham*, 100 U. S. 702.

Ins. Co. vs. Thomas, 83 Fed. R. 803, 48 U. S. App. 575.

VII.

The final assignment of errors is based upon the fact that the judgment is against the three appellants only, and is silent as to John R. McLean and William B. Orme, who were defendants below.

In the charge to the jury, at p. 73 of the Record, the court said:

"There is no prayer granted or asked by the plaintiff's counsel directed specially to informing you as to whether you may or may not find against the other two defendants, McLean and Orme, and I do not understand that he earnestly insists upon a verdict against them personally. I can only say to you that the evidence tending to show that they are personally liable is slight, and I submit the case to you with that expression, leaving it to your discretion to find for them or against them, as you may think best."

The jury accordingly brought in a sealed verdict, against the other defendants only, and without mentioning McLean or Orme. The verdict was received without objection on the part of any of the defendants; was treated as a verdict in favor of McLean and Orme by the appellants, who gave their appeal bond as the only principals, with McLean and Orme as their only sureties, and whose motion for a new trial was made and argued without mooting the objection now presented, which was raised in the Court of Appeals for the first time. See Rec., p. 79-80.

The only authority cited in support of the objection which is sufficiently pertinent for discussion, is Eng. & Am. Encyc., Title, Verdict, Vol. 28, p. 285; and the authorities there given dispose of the objection adversely to the appellants. The only favorable citation given is *Schweinhardt vs. St. Louis*, 2 Mo. App. 571; in which case it is held that the verdict must be for or against all the defendants, in order that those against whom the verdict is rendered may know whether or not they can look to their codefendants for contribution; from which decision it is to be presumed that contribution between tort-feasors prevails in that State.

In *Gulf RR. Co. vs. James*, 73 Tex. 12, upon a similar state of facts and the like objection, the court declared that the objection was one of form, not of substance; that there was no ambiguity or uncertainty as to the finding against the appellant, and that if the other defendants below had supposed that any doubt existed concerning themselves they could have the verdict corrected at the time.

In *Kinkler vs. Junica*, 84 Tex. 116, where there was a similar verdict, but the court had entered up the judgment against the defendants found guilty and in favor of the others, to which action it was objected that the verdict did not authorize the judgment, the court said:

“The effect of the verdict was a finding in favor of the remaining defendants, and judgment was properly entered in their favor.”

In *Lockwood vs. Bartlett*, 7 N. Y. Sup. 481, the jury disagreed as to one defendant, and found against the others. *Held*, that judgment was properly entered up as against the latter. The plaintiff, said the court, might have proceeded against the latter alone, or he might have dismissed as against the former, in neither of which cases could the latter have complained.

In *Ward vs. Taylor*, 1 Pa. St. 238, upon a verdict similar to that in the case at bar, the court said that the irregularity might be cured by entering a *nol. pros.* as to the omitted defendants, either in the Appellate Court or in the court below, the record being remanded for that purpose.

These are the authorities, and all of them, referred to in 28 Am. & Eng. Encyc., p. 285, which is the authority, and the only authority, pertinent to the question cited in support of the objection.

All the other citations in support of the tenth assignment of error will be found, upon examination, to be without bearing upon the present case. They are either cases in which the verdict finds facts which are not in issue, and omits to find those which are, as in *Patterson vs. United States*, 2 Wheat. 221; *State vs. Carleton*, 1 Gill. 250; or where the verdict is *non assumpsit*, where the action was in tort, as in *Garland vs. Davis*, 4 How. 147; or where a special verdict failed to find some fact which was essential to the plaintiff's right to recover at all, as in *Hodges vs. Easton*, 106 U. S. 408, etc.

On the other hand, where the verdict is defective in not finding all the facts essential to a judgment, but is free from

objection as to those which it does find, the authorities are believed to be harmonious to the effect that the *venire de novo*, if awarded, should be extended only to the issues not determined by the verdict, leaving those which are found by it to stand undisturbed.

Hughes *vs.* Hughes, 15 M. & W. 701.

Fletcher *vs.* Marshall, Id. 765.

Baxter *vs.* Nurse, 6 M. & G. 942.

Lambert *vs.* Fogg, 49 N. H. 310.

Lisbon *vs.* Lyman, 49 N. H. 582.

Wood *vs.* Wood, 52 N. H. 422.

Dexter *vs.* Codman, 148 Mass. 421.

In other words, if it were necessary to award a trial *de novo* in this case because of the omission to find specifically as to the defendants McLean and Orme, the issues thereunder, according to the authorities, should properly be restricted to the guilt or innocence of those defendants, and the findings thereunder, whatever they were, would in no way alter the judgment as to the appellants, who, accordingly, can have nothing of which to complain. As above pointed out, however, in the case at bar, the omission to find against the defendants, McLean and Orme, under the practically unanimous current of authority, is to be treated as a verdict in their favor; or, if not so, it is a mere irregularity, to be cured by *non pros.* as to them, either here or in the court below; and is, moreover, an irregularity of which, inasmuch as it does not injuriously affect or concern them, and especially as it was not excepted or objected to by them in the trial court, the appellants have no right to complain.

Finally, upon this point, the objection is not properly presented on this appeal. It should have been raised, in the trial court, by a motion in arrest of judgment. Hatton *vs.* McClish, 6 Md. 407, 418. It was not raised there, in *any* manner, and is not before this court, for any purpose. *Ib.*

It is respectfully submitted that the judgment should be affirmed.

J. ALTHEUS JOHNSON,

J. J. DARLINGTON,

Attorneys for Defendant in Error.

Syllabus.

WASHINGTON GAS LIGHT COMPANY *v.* LANSDEN.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 43. Argued October 17, 18, 1898. — Decided January 16, 1899.

In order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal.

A corporation can, however, also be held responsible for acts of its agent, not strictly within its corporate powers, which were assumed to be performed for it by an agent competent to employ the corporate powers actually exercised; but in such case, there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury, though this evidence need not necessarily be in writing.

When the only conclusion to be drawn from such evidence is a want of authority, the question is one for the court to decide without submitting it to the jury.

In this case the court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence on which to base a verdict against it.

The judgment in this case against Mr. Bailey also should be reversed, as it is not supported by the evidence.

In an action in tort brought in the District of Columbia, the common law rule prevails that those defendants who are sued together and found guilty are liable for the whole injury to the plaintiff, without examining the question of the different degrees of culpability; and as evidence of the wealth of the corporation defendant was admitted in evidence against all the defendants as a ground for punitive damages, and as the individual defendants were joined by the voluntary act of the plaintiff, the court is of opinion that it was not admissible as against them.

Evidence of the wealth of one of the defendants in an action of tort is inadmissible as a foundation for computing or determining the amount of such damages against all.

In a case of this character, where the line between compensatory and punitive damages is vague, it is impossible to say that, by merely charging the jury that punitive damages cannot be recovered, the effect of incompetent evidence received as to the wealth of one of the defendants was thereby removed, or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case.

Where a judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment *in toto*, and grant a new trial in regard to all the defendants.

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THE case is stated in the opinion.

Mr. R. Ross Perry and *Mr. Walter D. Davidge* for plaintiffs in error.

Mr. J. J. Darlington for defendant in error. *Mr. J. Altheus Johnson* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the defendant in error, plaintiff below, in the Supreme Court of the District of Columbia, against the Washington Gas Light Company; John R. McLean, its president; Charles B. Bailey, its secretary; William B. Orme, its assistant secretary; and John Leetch, its general manager. The action was brought to recover damages for an alleged libel which the plaintiff stated the defendants had published or caused to be published of and concerning him in a periodical printed in the city of New York called *The Progressive Age*. The plaintiff recovered a verdict of \$12,500 against the corporation defendant, its secretary Bailey, and its general manager Leetch. There seems to have been no finding as to the other defendants.

Those defendants against whom the verdict was rendered brought the case by appeal to the Court of Appeals for the District, where the judgment was affirmed, and the defendants then brought the case here on writ of error.

It appears from the declaration that a committee of the House of Representatives, in January, 1893, having in charge the sundry civil appropriation bill, had therein provided that not more than seventy-five cents per thousand feet should be paid for gas used in the government buildings in the District of Columbia. The gas company desired to defeat this provision in the bill, and the president, Mr. McLean, sent for the plaintiff below, who was general manager of the company, for the purpose of inquiring what the plaintiff could testify to in regard to the price of gas if called before the committee. The president asked the plaintiff to furnish him with a writ-

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ten memorandum showing generally what he could testify to and which he might use as a basis for questions to be put to him by some member of the committee. The plaintiff wrote out such a memorandum, but did not mention therein the cost of gas to the defendant company, and when the president noticed the omission he asked the plaintiff what the cost would be, and plaintiff stated that that was a matter which should come from the chief officers of the company, and which was unknown to him.

The plaintiff did not testify before the committee at that session of Congress.

Thereafter and in February, 1894, and when not requested by the president of the company or any of its officers or agents, the plaintiff did appear before a committee of Congress, and did testify to figures at which plaintiff supposed gas could be actually produced and furnished in the city of Washington.

The plaintiff then alleged that the defendants in the month of February, 1894, published or caused to be published in a newspaper or periodical called *The Progressive Age*, which was printed in the city of New York, and widely circulated as an organ devoted to the interests of gas producers and manufacturers throughout the country, the libel in question.

The article states in substance as follows: The plaintiff had once filled the position of general manager of the gas company, which he had resigned in June, 1893, and that in his testimony before the Congressional committee in 1894 the plaintiff had arrayed himself within the ranks of those who sought to tear down and lay waste the business and emoluments of his former employers. He gave testimony which was reported through the land and was of such a nature as was calculated to do the utmost harm to gas interests everywhere. The figures supplied by Mr. Lansden of the cost of gas were startling, and only a year ago (in 1893) a similar inquiry emanating from the same quarter was instituted before a Congressional committee against the Washington Gas Light Company, and plaintiff appeared as a witness in behalf of the company; that he then occupied the position

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of general manager of the company, and his testimony then, as compared with that given subsequently, was sadly at variance; that he had there testified before the committee that it cost 48.38 cents per thousand to manufacture gas in the holder, and 40.09 cents per thousand for distribution, and that he knew of but one way that a small amount could be saved, and that was by reducing the salaries of the clerks and the price paid to the laborers, which the company would not like to do. In 1894, before a committee of Congress, the plaintiff testified that from his knowledge of the business and the condition of affairs at Washington, the gas company could sell gas and pay a reasonable profit at a dollar a thousand. He stated that in his opinion the gas could be manufactured and put in the holder for about thirty-two cents a thousand feet, and that it ought to be distributed for from twenty to twenty-two cents a thousand, which would make the whole cost from fifty-two to fifty-four cents per thousand. The article then continued:

"From the foregoing extracts of this witness' testimony only one of two conclusions can be arrived at, and we are too sensible of the reader's power of analysis and feel too keenly for the witness to heap coals of fire on the head of one who, it is only too evident, has allowed his sense of justice to be distorted by real or fancied grievances. The testimony given by Mr. Lansden in 1893 states in effect that there is no way open to his company by which it could reduce the cost of manufacturing gas. In 1894 he tells the committee that—taxes and repairs added, items not considered in the inquiry of the previous year—the cost of gas delivered to the consumer could be brought within seventy cents, or about eighteen and one half cents less per thousand than he quoted as the lowest manufacturing and distributing cost the year before; and yet Mr. Lansden must know that the generating apparatus at the Washington works is the same as when he filled the position as superintendent; that the cost of all materials used, coal and labor are just the same, save only naphtha, which is now higher in price than when he testified a year ago."

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For publishing or causing to be published this article the plaintiff brought this action.

The defendants joined in their plea of not guilty, and the plaintiff joined issue thereon. After verdict a motion for a new trial was made and denied, and judgment entered upon the verdict.

The questions which present themselves in this record relate primarily to the liability of each of the plaintiffs in error, and those questions depend for their proper solution upon the evidence set forth in the record.

And first in regard to the liability of the corporation. From the evidence it appears that at the time of the publication of the libel John Leetch was the general manager of the gas company. After the plaintiff had been sworn before the Congressional committee, in February, 1894, one E. C. Brown, who was the publisher of the periodical called *The Progressive Age*, and who lived in the city of New York, wrote a letter, under date New York, February 12, 1894, addressed on the inside to the Washington Gas Light Company, Washington, D. C. That letter reads as follows:

"Gentlemen: I have watched with great interest the continued reports of the proceedings against your company, as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Were his statements correctly reported in the *Washington Star* of 3d inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

"Very truly yours,

"E. C. BROWN."

The envelope enclosing this letter was addressed to "John Leetch, Manager Washington Gas Light Co."

In reply to that letter, Mr. Leetch wrote the following:

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“WASHINGTON, D. C., *Feb.* 13, 1894.

“E. C. BROWN, Esq, Publisher *Progressive Age*,

“280 Broadway, N. Y.

“Dear Sir: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former sup't of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

“As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

“As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for seventy cents and to the consumer for \$1.00 per 1000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

“Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington, and made the following replies:

“‘Q. What does gas cost to manufacture at your works?

“‘A. It costs us 48.38 c. per thousand in the holder and 40.09 c. per thousand for distribution.

“‘Q. Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

“‘A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

“‘Q. How do the prices charged for lamps in Washington compare with other cities?

“‘A. They are as low as any where the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps.’

“You will notice that he makes a difference of about 18½ cents per 1000 feet then as compared with his statement now,

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although he must know that the material used, coal and labor, is just the same now as then, except price of naphtha, which is higher. You can try to reconcile the two statements.

“Very truly, yours,

“JOHN LEETCH,

“General Manager.”

There is no evidence that any other officer of the company or any member of its board of directors advised or requested Mr. Leetch to send this letter or was cognizant of his intention in that regard. Mr. Leetch swore that the letter was written by him unaided, and that the letter from Brown was a personal letter, and he answered it as such.

After Leetch received the letter, and before he answered it, he had a conversation with Mr. Bailey, the secretary, in which he informed the secretary that he had received such a letter, and he then showed it to Bailey, who read it and returned it to Leetch. Bailey then said to Leetch that he (Bailey) had a paper in plaintiff's handwriting, where he stated “that the price of gas was so and so, and that the price of distribution was so and so,” and he then gave Leetch the paper. Bailey said he did not know what Leetch wanted with it, and he thought nothing more about it; that Leetch took the paper and went off to his room, and Bailey never saw it again or heard of it until after Leetch's letter was written and sent. Bailey swore he knew nothing about Leetch's letter in answer to Brown until after it was sent, and that he gave no data to Leetch to reply to the letter, but simply told Leetch as matter of fact the plaintiff had said that gas could be made and sold at a profit at a dollar a thousand.

On the 14th of February, 1894, Mr. Brown wrote another letter, addressed to John Leetch, general manager, Washington Gas Light Company, Washington, D. C., in which he asked for more details in regard to the testimony of plaintiff before the committee of Congress. Receiving no reply, Mr. Brown, under date of February 19, again wrote Leetch, asking for the details as mentioned in his preceding letter of the 14th. This letter was answered as follows :

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"E. C. BROWN, Esq., Publisher Progressive Age,
"280 Broadway, N. Y.

"Dear Sir: I am in receipt of yours of the 14th and 19th instant. This delay in reply was my inability to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee.

"To-day I received a copy, which I herewith enclose for your use.

"Respectfully,

"JOHN LEETCH,
"General Manager."

There is no evidence showing that this letter was either written by authority of any officer or director of the company, or that any such officer or director had any knowledge in regard to it.

It appeared in evidence that some time after Leetch answered the letters he placed them among papers of the company in the secretary's office, and they were so placed, because, as Mr. Leetch testified, it was a matter that had then assumed a position when it was necessary to save the letters, and he therefore placed them in the care and custody of the secretary.

Mr. Leetch further testified that none of the letters written by him were written in his capacity as general manager of the company; that they were written by him as a mere personal matter, altogether exclusive of any duty that he owed the gas company; that the gas company had no interest in the matter, and that he merely wrote them as an act of courtesy, stating the facts.

It also appeared that all the letters written by Mr. Leetch to Mr. Brown were copied by Leetch into the letter book of the company kept in the secretary's office, all the letters in which book were written either by the secretary, the assistant secretary or the general manager. Mr. Leetch did not know of any letters of personal or individual matters in that book prior to March 1, 1894, or that did not relate to the affairs of

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the gas company, except those of the same nature as those letters above referred to.

The testimony also showed that Mr. Leetch, at the time he was made manager, was appointed generally to take care of the works and to do the best he could for the company; that he was a gas engineer, and took care of the works and took the place of what used to be the engineer, and after his appointment they had two engineers, one at each end, who were subordinate to Mr. Leetch.

As bearing upon the duties of Mr. Leetch, the record also contains evidence in the shape of a letter signed by the president by the authority of the board of directors of the gas company, dated Washington, March 1, 1865, and addressed to Mr. George A. McIlhenny, by which the latter was appointed superintendent of the gas works, and his duties were therein stated to be to take charge of every portion of said works pertaining to the manufacture, distribution and consumption of gas, and all persons employed in those departments; contracts for purchasing coal and selling tar were to be made by the president, but the superintendent was authorized to contract for other supplies to the works, the contracts to be submitted to the president for approval. The superintendent was to fix the price of coke, but all coke was to be purchased and paid for at the office. The superintendent was to have stated hours for being at the office in town and give attention to all complaints of leaky mains, etc. His special attention was directed to certain points regarding the standard for gas and increasing its product per pound of coal; increasing the coke sold; saving of refuse coke; reduction of men employed at the works; number of thousand feet of gas produced, and all other points which need correction; the letter closing with the statement: "The welfare of the company demands economy in its management, and that the gas produced shall be uniformly good." From that time until the year 1886 there is no evidence regarding the duties of superintendent or manager of the company.

In September, 1886, at a meeting of the board of directors, the president called the attention of the board to the necessity

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of employing a competent man to fill the position of superintendent of the company, (said position being formerly designated engineer,) and Mr. McIlhenny (the president) was authorized to employ such person for the position. Pursuant to that authority the president wrote to Mr. Lansden (the plaintiff) stating: "Our board of directors has authorized me to employ a superintendent, and I have concluded to offer you the position at a salary of \$5000 per annum, payable monthly, the condition being that you will give satisfaction, presuming that you are a first class gas works superintendent, otherwise this agreement may be revoked at any time." The plaintiff was at this time a gas engineer, who is, as plaintiff testified, a man who constructs and manufactures gas works and manufactures gas. His duties as superintendent would not enable him precisely to know the cost of the manufacture and distribution of gas.

Mr. McLean, president of the company, testified on this trial in regard to the position of Mr. Leetch; that he first had a recognized position with the company after Mr. Lansden (plaintiff) had left the service of the company; that he thought Leetch was on the pay roll of the company at that time; he was just generally employed there and familiarized himself with the company, but had no positive employment until after Mr. Lansden, the plaintiff, left; that Mr. Leetch was not put in exactly the position Mr. Lansden had occupied, but that in fact he was appointed generally "to take care of the works and to do the best he could do for the company; that he was a gas engineer and took care of the works."

This is all the evidence contained in the record bearing upon the duties of Mr. Leetch as general manager of the company and of his right to act for it in the above matter.

The question arises whether upon these facts and the legitimate inferences which may flow from them, the corporation defendant can be held liable for the publication of the libellous article in *The Progressive Age*.

That a corporation may be held responsible in an action for the publication of a libel is no longer open for discussion in this court. *Philadelphia, Wilmington & Baltimore Railroad*

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v. *Quigley*, 21 How. 202, 210. In that case the company was held liable in damages to the plaintiff, Quigley, for the publication of a libel regarding the plaintiff's skill and capacity as a mechanic. Quigley brought his action against the company because the company published a letter addressed to it in the course of an investigation by its board of directors in regard to the conduct of some of its subordinates. The letter contained libellous matter in regard to the plaintiff, and with much other testimony was printed and published by the board of directors, and the court decided that the corporation could be held liable for the publication. In that case Mr. Justice Campbell, in delivering the opinion of the court, said: "That for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." The doctrine of this case has been approved and reaffirmed in many cases in this court since that time.

The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. *Salt Lake City v. Hollister*, 118 U. S. 256, 260; *Denver & Rio Grande Railway v. Harris*, 122 U. S. 597, 609; *Lake Shore & Michigan Southern Railway v. Prentice*, 147 U. S. 101, 109, and cases cited at p. 110.

In this case no specific authority was pretended to have

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been given the general manager, Leetch, to write the letters which he sent to Brown, or to authorize the publication of anything whatever in the periodical named. We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself. There is no evidence of an express authority, nor of any subsequent ratification of Leetch's conduct by the company. Can any authority be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence we find nothing upon which such an inference can be based; nothing to show that any correspondence whatever, upon the subject in hand, was within the scope of the manager's employment. Commencing with the time when a superintendent was employed in March, 1865, down to the employment of Leetch, no such power could be inferred from the evidence regarding the duties of a superintendent or manager. In March, 1865, the duties of such an officer were plainly stated. They were: "To take charge of every portion of said works pertaining to the manufacture, distribution and consumption of gas and all persons employed in those departments." Further details of his duties were mentioned in the writing making the appointment, but they all related to the carrying on of the business of the company. From all

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that appears in the record the duties of superintendent of the gas works remained as stated in the communication as above mentioned, with possibly a change in the name from superintendent to engineer, until 1886, when, under authority of the board of directors, Mr. Lansden, the plaintiff, was employed as superintendent upon the presumption, as stated, that he was a first class gas works superintendent. There is nothing from which we could infer that the character or scope of the duties of superintendent was enlarged or changed at the time the plaintiff accepted the position from what those duties were stated to be in the letter appointing a superintendent in 1865.

From the evidence in the case, no presumption could be indulged that the duties of the general manager of the corporation in question included in their general scope or character the right to represent the corporation in any business such as is referred to in the letters of Brown or in the letters of Leetch in answer thereto. The letters of Mr. Brown had nothing whatever to do with the transaction of the business of the corporation or with anything relating thereto which the superintendent was authorized to perform. It was an inquiry relative to a past transaction regarding the testimony supposed to have been given before a committee of Congress, having, among other things, the subject of the price of gas in the city of Washington before it for consideration. From the evidence in this case, it is plain that it was no part of the duty of the general manager even to appear before that committee unless summoned so to do by the committee, or specially directed by the company to so appear. In no view of the evidence can we see the least basis for an inference that the manager had authority to represent the company in any matter connected with third parties and relating to the character of the evidence given by the plaintiff before the committee of Congress.

The manager did not himself regard the correspondence as one of an official nature, and he swears that he answered the letters as a mere personal matter, altogether exclusive of any duty that he owed to the gas company; that the gas

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company had no interest in it, and he merely wrote the letters as an act of courtesy stating the facts, and that none of the officers of the company were informed as to the contents of the letters that he wrote, and they were ignorant regarding them.

The plaintiff, of course, would not be bound by the evidence of Mr. Leetch as to how he regarded the letters or in what capacity he thought that he was answering them, if there were other evidence in the case from which a contrary inference could properly be drawn — evidence from which it could be inferred that the manager was acting within the scope of his employment as manager; in such case it would be proper to refer the question of fact to the jury to ascertain whether the letters were written within the scope of his employment, notwithstanding his assertion that he wrote them in his personal capacity. But there is no such evidence.

The fact that the manager copied his letters to Brown into the official copy book kept in the office of the secretary is not material upon this question. It was the act of Mr. Leetch, unknown to the officers of the company, so far as the record shows, and the company cannot be held liable for the original act of Leetch by such evidence. It does not tend to show that his action was within the scope of his employment as manager.

If we set aside for a moment the testimony in regard to the duties to be performed by the superintendent, as stated in the communication of March, 1865, and look simply at the other facts in the case, we are still without any evidence from which it might be inferred that the act on the part of the manager was within the scope of his employment. The burden is upon the plaintiff to show this fact.

From the use of the term "general manager" we should not be authorized to infer any such authority, nor would it be permissible to allow the jury to make a mere guess that it existed. A general manager of a business corporation, such as this gas company is, would not be presumed to have this power. The term, in our judgment, when used in connection with such a corporation cannot, in the absence of any

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evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, its distribution and the general ways and means of accomplishing the object of the corporation — all these in subordination to the board of directors and such superior officers as the board should provide.

We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it.

The next question arises in regard to the defendant Bailey.

The only evidence in regard to this defendant is that he was secretary of the company at the time in question; that after Mr. Lansden, the plaintiff, had made the memorandum in preparation for his being called as a witness before the Congressional committee in 1893, and in which memorandum he had stated the cost of gas, (although, as he says, he took that cost from the president, and did not pretend to state it as of his own knowledge,) he gave the memorandum to Mr. McLean, the president of the defendant company, who gave it to Mr. Bailey, the secretary, who had kept it in his possession from that time; that after Mr. Leetch received Mr. Brown's first letter relating to the plaintiff's testimony before the Congressional committee of 1894, Mr. Leetch showed him (Bailey) the letter, and that Mr. Bailey then read it, and stated: "I have a paper in Mr. Lansden's own handwriting, where he stated that the price of gas was so and so and the price of distribution was so and so;" and he then gave Leetch the paper; that he then knew that the items therein, so far as they regarded the cost of distribution, did not rest on plaintiff's personal knowledge, but that they came from the books; that he did not know what Leetch wanted with the paper; that he thought nothing about it; that Leetch had asked him

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"Where is the paper?" and he then got it, and Leetch asked him to let him take it; and that Leetch did take it and went off to his room, and that Bailey never saw it again or heard of it until after the letter was written; that Bailey did not give Leetch any data to reply to the letter and he thought nothing about writing the letter, and that he simply said, as a matter of fact, that he (Lansden) had said that gas could be made and sold at a profit at a dollar. He never knew that the first letter of Brown had been answered until he saw it in *The Progressive Age*.

This is all the evidence connecting Mr. Bailey in any way with the publication of the libel, and we think it wholly insufficient for that purpose. We think there is nothing in this evidence from which the inference can reasonably and fairly be drawn that there was any intention on the part of Mr. Bailey to furnish Mr. Leetch with the figures in the memorandum so that he might answer the letter from Mr. Brown, and have the figures or any other matter published in his paper.

A finding by the jury, that Mr. Bailey furnished the information contained in this memorandum to Mr. Leetch for the purpose of having him communicate it to Mr. Brown, and for the purpose of having Mr. Brown publish the same, would not be supported by any evidence in this case. Such a finding would be a pure guess, unsupported by any evidence, and the jury should not be offered the opportunity to make it. The judgment should, therefore, be reversed as against Mr. Bailey.

The third question relates to the judgment against Leetch.

We are of opinion that the judgment ought also to be reversed and a new trial awarded as against him. We do not think it would constitute a defence in his case that there were other matters contained in the article published by Mr. Brown, not pertaining to and which were no part of the subject-matter upon which Mr. Leetch wrote his letters. For anything appearing in that publication which was outside and beyond the scope of the subject-matter of the letters of Mr. Leetch, he would not be responsible, because he could not be charged with authorizing the publication of such matter in any form, but if upon all the evidence on another trial the jury should be satis-

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fied he furnished the publisher, Mr. Brown, with information of a libellous character regarding the plaintiff, for the purpose and with the intention of having the same published by Mr. Brown, we think that the defendant might be held liable for such publication on the ground that it was published by his aid and procurement and substantially by his agent. Of course, the evidence would have to be sufficient to justify a jury in finding the fact of such intention, and that the information was so furnished to Mr. Brown.

There are, however, two grounds upon which we think this judgment should be reversed, and no judgment entered upon the verdict even as against Mr. Leetch, one of which rests upon an exception to evidence, and the other is based upon the substantial injustice which we think might be the result if we were to permit judgment to be entered upon the verdict as against him alone.

When the plaintiff was on the stand, upon direct examination, he testified that the total capital stock of the company defendant was \$2,000,000. He was then asked as to the dividends that had been paid upon the stock within his knowledge. This was objected to by counsel for defendants, who said it was perfectly well known that the gas company was able to pay the amount claimed in this libel case, and what dividends they pay is a matter private to the company.

Counsel for plaintiff said he was seeking to show only its earning capacity. To which counsel for defendants said they would admit that the company was able to pay this amount claimed. "THE COURT: Still they have the right to show the volume of the property of the company, and any evidence tending to show the volume of the property would be competent." To which ruling of the court counsel for the defendants excepted.

The witness then testified that the company had paid the last two regular dividends of ten per cent upon its capital stock.

The court then said to counsel: "That the admission of the fact that the company was able to respond in damages amounted to nothing; that the object of the evidence was

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to furnish the jury a basis upon which they might calculate exemplary damages if they were entitled to exemplary damages, as was claimed. If the jury were going to give exemplary damages they might give much larger damages against a very wealthy person than they would against a person of ordinary circumstances." Counsel for the defendants said that their claim was only \$50,000. To which the court responded: "If you admit that if they are entitled to a verdict at all they are entitled to \$50,000, that does away with the necessity of the evidence; otherwise I think it would be admissible." And under the objection and exception of the defendants' counsel the witness then testified that he knew what dividends had been paid by the gas company since 1890, but did not know what had been earned; that every year they had paid 10 per cent; that in 1893, they had paid 15 per cent; that was an extra dividend; that in 1895 they had paid \$400,000—an extra dividend; that from 1890 down to the present time they had paid the regular 10 per cent dividend every year, and that in 1890 they had issued \$600,000 of interest-bearing certificates to the stockholders, which would make it 40 per cent for that year, and in 1893 there was a special dividend paid of \$3 per share in addition to the 10 per cent; that in 1894 he did not know of anything being paid but the regular dividend; that in 1895 they paid \$4 a share, and that it takes \$200,000 to make the regular dividend, and they paid \$400,000 extra in, \$600,000 altogether. The court did not directly instruct the jury that the evidence was only admissible for the purpose stated by him in his reply to the objection made by counsel for the defence. In his final charge to the jury and upon the request of the counsel for the defendants, the court instructed the jury that the plaintiff was not entitled to recover punitive damages against the defendant company or against either of the other defendants, but only such damages as the evidence proves that he has sustained on account of the action of the defendants, if any.

The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against

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the company alone. All the defendants joined in a plea of not guilty, and the jury could not find a verdict of guilty against all, and apportion the damages among the several defendants by giving a certain amount as against the company and a certain other amount as against the individual defendants. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable. Cooley on Torts, 133, 135, 136; *Currier v. Swan*, 63 Maine, 323; *Berry v. Fletcher*, 1 Dill. 67; *Pardridge v. Brady*, 7 Ill. App. 639; *McCarthy v. De Armit*, 99 Penn. St. 63, 72.

The rule is different in South Carolina, where the jury can apportion the damages among the different defendants found guilty. It is acknowledged to be a departure from the rule at common law. *White v. McNeily and others*, 1 Bay, 10, 11.

As between themselves, there is no contribution among several tort feorsors. *Merryweather v. Nixan*, 8 T. R. 186; *Farebrother v. Ansley*, 1 Camp. 343; *Wilson v. Milner*, 2 Camp. 452; Cooley on Torts, pp. 148, 149. A verdict might therefore be rendered against all defendants and collected out of one, and he would have no right of contribution. And the verdict, enhanced by the evidence of the wealth of one defendant, might be collected from the defendant the least able to respond and the least culpable of all, who would thus be mulcted in punitive damages, the amount of which might have been measured by the evidence of the wealth of another defendant.

In this case the jury was bound to give one entire sum against all the defendants found guilty, and that sum would be included in the judgment against each of them. The object of the evidence in relation to the capital stock of the corporation and the dividends declared by it was, as stated by the court to counsel, for the purpose of furnishing the jury the basis upon which they might calculate exemplary damages, yet it is not plainly limited to that purpose by any direction given to the jury by the court. If the evidence would be ad-

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missible for the purpose stated by the court to counsel, in a case against the corporation alone, can it be that it would be admissible also in a case like this, where individual defendants are joined by the voluntary act of the plaintiff? We are of opinion that the evidence in regard to them would be inadmissible. It would form no basis for any verdict against the individual defendants. While a defendant who is least to blame is still liable for all the damages suffered by plaintiff, he is not liable to respond in punitive damages, the amount of which may be based upon particular evidence of the wealth of some other defendant.

Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined. What the true rule is in such case is not perhaps certain. 7 Ill. App. 639; 99 Penn. St. 63. But we have no doubt it prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages against all.

In many cases against several defendants it frequently happens that evidence is competent and is admitted as against one of the defendants only, and the court, on its own motion or on the request of the other defendants, would charge the jury that such evidence could not be taken into consideration as against the defendants to whom it did not apply. But here such a

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power cannot be exercised. The court cannot say to the jury that the evidence of the wealth of the corporation is only received in regard to it and as furnishing a basis for a computation of exemplary damages against it. If received at all it must be received against all the defendants, as but one verdict can be given against all who are found guilty, when in truth in regard to all of them but the corporation it is evidence which is absolutely incompetent. Yet if the evidence is received on the assumption that it is material in relation to the corporation, the other defendants are affected by it the same as the corporation, and a verdict may very probably be enlarged against them because of the evidence as to the ability of the corporation defendant to pay. The jury is thus permitted to take into consideration the wealth of one defendant upon the question of the amount of the verdict against all of them.

Objection to the evidence was taken by counsel, and we think under the circumstances was well taken, and the exception is good in behalf of the individual defendants who were necessarily affected by its introduction.

But it is said that this error, if any, was cured by the ruling of the court in response to the request of defendants' counsel that punitive damages should not be granted. We are not certain as to that. As we have said, the court gave no instruction to the jury that it could only consider the evidence in connection with the question of punitive damages. The remark of the court as to the object of the evidence was made to counsel, and the court did not in any instructions given plainly limit the jury to its consideration for that purpose alone. The evidence was never withdrawn by the court, nor was the jury directed to take no notice of it. If the court admitted the evidence for one purpose only, and yet did not afterwards in terms withdraw it from the consideration of the jury, it was of such a nature that it still might affect the jury, even though the basis for its admission originally had disappeared. It is true the defendants did not in so many words ask the court to withdraw the evidence from the jury. It was, however, duly objected to when received, and it was

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error to receive it. Under such circumstances, in order to cure the error, the court, when deciding that punitive damages could not be recovered, should have plainly and in distinct language withdrawn this particular evidence from the jury. We cannot be certain that its effect was removed by this action of the court. In a case of this character, where the line between compensatory and punitive damages is quite vague, and compensatory damages may be based upon the injury to the feelings and good name of a plaintiff, and where the amount even of such compensatory damages rests so largely in the discretion of a jury, we think it is utterly impossible to say that by merely charging the jury that punitive damages cannot be recovered, the effect of the incompetent evidence as to the wealth of one of the defendants was thereby removed or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case.

We are also of opinion that even upon the assumption that no error was committed upon the trial as against the defendant Leetch, which in itself would call for a reversal, yet the judgment should be wholly reversed and no judgment entered upon the verdict as to him, because the original verdict was against the three defendants, and it was given under such circumstances that we might well fear the amount was enlarged by the evidence as to the wealth of the corporation, and it is possible, if not probable, that if a verdict had been rendered against the individual defendant alone, it would have been for a materially less amount. At any rate, the jury has never been called upon to render a verdict against a sole defendant, and while it may be said that whether against one or against all the defendants, the plaintiff suffers the same damage and should be entitled to a verdict for the same sum, still the question arises whether a jury, in passing upon the several liability of the individual defendant, would give a verdict of the same amount as it would if both the other defendants remained. We cannot say it would, and as the jury has never rendered a verdict against Mr. Leetch individually and solely, and as the case is one where damages are so largely in the sole discretion of the jury, we think it unjust and improper to permit this

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verdict to stand against Leetch alone while we set it aside as against the other defendants.

Where the judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant, if it were to remain intact as against him, while reversed for error as to the other defendants, then we think the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment *in toto* and grant a new trial in regard to all the defendants.

The question is discussed with much fullness in *Albright v. McTighe and others*, 49 Fed. Rep. 817, and the same conclusion is arrived at.

The provisions contained in the judgment in *Pennsylvania Railroad v. Jones*, 155 U. S. 333, at 354, indicate the opinion of this court that it was right to reverse the entire judgment in that case for error in regard to one of several defendants, but the court held that as the error did not affect the others, the plaintiff should have liberty to become non-suit as to the one defendant and to then have judgment upon his verdict against the others. In that case there was a failure to prove a cause of action against the one defendant while no such failure existed as to the others, and there were no special reasons for a total reversal, but on the contrary, justice seemed to require that plaintiff should have the liberty of entering judgment upon his verdict against the other companies.

In regard to the defendants, McLean, the president, and Orme, the assistant secretary, the judge charged the jury that there was no prayer granted or asked by plaintiff's counsel directed specially to informing the jury whether it might or might not find against those defendants; that he did not understand that the plaintiff's counsel earnestly insisted upon a verdict against them personally; and he could only say that the evidence tending to show that they were personally liable was slight, and he submitted the case to the jury with that expression, leaving it to their discretion to find for or against them as they might think best. There was no finding by the jury against those defendants, and no judgment was entered against them and they have not brought error. In reversing

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the judgment we do not intend to reverse what may be considered a finding of the jury in their favor.

For the reasons given, we reverse the judgment of the Court of Appeals of the District of Columbia, with directions to that court to reverse the judgment of the Supreme Court of the District of Columbia and to grant a new trial to the three defendants who are plaintiffs in the writ of error sued out from this court.